In the

United States Court of Appeals

For the Seventh Circuit

No. 12141

GENERAL CASUALTY COMPANY OF AMERICA, a corporation,
Petitioner

The Honorable KENNETH P. GRUBB, Judge of the United States District Court for the Eastern District of Wisconsin,
Respondent

Original Petition for Writ of Mandamus

BRIEF AND APPENDIX FOR PETITIONER

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GENERAL CASUALTY COMPANY OF AMERICA, a corporation, *Petitioner,* *vs.* **The Honorable KENNETH P. GRUBB, Judge of the United States District Court for the Eastern District of Wisconsin,** *Respondent.*	Original Petition for Writ of Mandamus.

BRIEF AND ARGUMENT FOR PETITIONER.

STATEMENT OF FACTS.

Petitioner, General Casualty Company of America, is a corporation organized under the laws of the State of Washington, and is licensed to transact the business of insurance in the State of Wisconsin. Gustave F. Keller and Helene E. Keller are husband and wife, are citizens of the State of Wisconsin, and reside at 5895 North Witte Lane, in the City and County of Milwaukee, State of Wisconsin.

On October 15, 1952, General Casualty Company of America had in effect a policy of automobile liability in-

surance issued to Gustave F. Keller, insuring him against loss or damage caused by the negligent operation of his 1950 Buick automobile.

On October 15, 1952, Mrs. Keller sustained personal injuries when she was a passenger in her husband's automobile as she and her husband were traveling on Highway 66 in the state of Oklahoma. In 1954, Mrs. Keller brought suit against her husband and others in a state court in Oklahoma to recover damages for her personal injuries. The trial of the action resulted in a judgment in favor of Mrs. Keller, largely in excess of the policy limits of General Casualty Company of America. The judgment was against the husband and others. There has been an appeal to the Oklahoma Supreme Court from the judgment.

After the judgment was entered in the state court of Oklahoma, General Casualty Company of America, which was not a party to the action, brought a declaratory judgment action in the District Court of the United States for the Eastern District of Wisconsin against Gustave F. Keller and Helene E. Keller for a declaratory judgment and alleged that Gustave F. Keller failed to cooperate in the defense of the Oklahoma state court action, and that such failure constituted a violation of the terms and conditions of the insurance policy issued by General Casualty Company of America to Gustave F. Keller.

Counsel for Gustave F. Keller and for Helene E. Keller have moved for transfer of the action instituted by General Casualty Company of America to the District Court of the United States for the Western District of Oklahoma. The trial court permitted counsel to amend their petition so as to request a transfer of the action to the District Court of the United States for the Northern District of Oklahoma. The motions to transfer were made under the provisions of Section 1404(a) of Title 28, U. S. Code. The motions recited that the declaratory judgment action could have

been brought in the District Court of the United States for the Northern District of Oklahoma.

The trial court in a memorandum decision held that the action could have been brought in Oklahoma and granted the motion to transfer. Because the Circuit Court of Appeals for the Seventh Circuit has never passed upon the question and because the Order entered by the trial court is not an appealable order, General Casualty Company of America has filed its petition for a writ of mandamus to have this court pass upon the propriety of the order of transfer.

SUMMARY OF ARGUMENT.

I.

THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT HAS JURISDICTION TO GRANT THE PETITION FOR A WRIT OF MANDAMUS.

This Court has held that it may issue a writ of mandamus to compel a district court to transfer an action under Section 1404(a) of Title 28, U. S. Code, from one United States District Court to another.

The United States Supreme Court has held that under the All Writs Act, the Circuit Court of Appeals may issue a writ of mandamus directing a District Court to take specific action under Sec. 1404(a) of Title 28, U. S. Code.

A writ of mandamus should be granted to review the propriety of an order of a district judge transferring an action outside the circuit in which the transferor is located.

II.

THE TRIAL COURT DID NOT HAVE JURISDICTION TO TRANSFER THE ACTION BECAUSE THE PLAINTIFF COULD NOT HAVE BROUGHT THE ACTION IN THE OKLAHOMA COURT TO WHICH THE TRIAL COURT ORDERED THE ACTION TRANSFERRED.

Section 1404(a) of Title 28, U. S. Code, authorizes a transfer of an action from one district court to another in which the action might have been brought.

Judge Grubb held that an action might have been brought within the meaning of Section 1404(a) of Title 28, U. S. Code, where the defendant consents to submit to the jurisdiction of the transferee court.

Section 1404(a) of Title 28, U. S. Code, was an out-

growth of the doctrine *forum non conveniens* and did not change the fundamentals of that doctrine.

One of the relevant factors of the doctrine *forum non conveniens* is that there must be two forums in which the defendant is amenable to process.

Where the plaintiff moves for a transfer to a district where the defendant is not amenable to process, the courts have uniformly refused to transfer the action on the ground that the action might not have been brought in the transferee court.

Although some Courts of Appeals and District Courts have held that an action might have been brought in the transferee court where the defendant consents to submit to the jurisdiction of such courts, some Courts of Appeals and a multitude of the District Courts have held that an action might not have been brought in a transferee court where the defendant was not amenable to process in the district where the transferee court is located.

The leading case holding that there can be no transfer to a district in which the defendant is not amenable to process was decided by Mr. Justice Whittaker of the United States Supreme Court when he was district judge.

Both reason and authority require denial of a motion to transfer a case to a district where the defendant is not amenable to process.

III.

JUSTICE REQUIRES THAT THE ACTION REMAIN IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

The action should not be transferred to Oklahoma because the action is governed by the law of the State of Wisconsin.

In the event of a transfer to Oklahoma, the Oklahoma law will govern under *Erie R. Co.* v. *Tompkins*.

THE CONTESTED ISSUES.

1. Does the Circuit Court of Appeals for the Seventh Circuit have jurisdiction to grant a writ of mandamus as prayed for by the petitioner?

2. Might the action have been brought in the District Court of the United States for the Northern District of Oklahoma within the meaning of sec. 1404(a), Title 28, U. S. Code?

3. Does justice require that the action remain in the District Court of the United States for the Eastern District of Wisconsin?

PROPOSITIONS OF LAW RELIED ON.

I.

This court has jurisdiction to grant the writ of mandamus which the petitioner prays for.

Chicago R. I. & P. R. Co. v. *Igoe*, 220 F. 2d 299 (CCA 7, 1955).

LaBuy v. *Howes Leather Co.*, 352 U. S. 249, 1 L. Ed. 2d 290.

II.

Section 1404(a) of Title 28, U. S. Code is an outgrowth of the doctrine *forum non conveniens* which presupposes two forums in which the action might have been brought.

Norwood v. Kirkpatrick, 349 U. S. 29, 32.

Christopher v. American News Co., 176 F. 2d 11 (CCA 7).

Foster-Milburn Co. v. Knight, 181 F. 2d 949, 952 (CCA 2).

Shapiro v. *Bonanza Hotel Co.*, 185 F. 2d 777 (CCA 9).

Gulf Oil Corp. v. *Gilbert*, 330 U. S. 501-507, 67 S. Ct. 839, 842, 91 L. Ed. 1055.

III.

The courts have uniformly held that there must be two forums in which the defendant is amenable to process where the transfer is made by the plaintiff in the action.

Rogers v. *Halford*, 107 F. Supp. 295 (D. C. E. D. Wis.).

Mitchell v. *Gundlach*, 136 F. Supp. 169 (D. C. Md.).

Foster-Milburn Co. v. *Knight*, 181 F. 2d 949, 952 (CCA 2).

IV.

The more logical decisions hold that a motion made by a defendant to transfer an action to another district will be denied unless the defendant is amenable to process in the transferee district.

General Electric Co. v. Central Transit Warehouse Co., 127 F. Supp. 817 (D. C. Mo.).

Foster-Milburn Co. v. Knight, 181 F. 2d 949, 952 (CCA 2).

Gilpin v. Wilson, 148 F. Supp. 493 (D. C. Ala.).

Mitchell v. *Gundlach*, 136 F. Supp. 169 (D. C. Md.).

V.

The law of the State of Wisconsin should be controlling in determining the question of lack of cooperation under the policy and the question of the exercise of good faith in failing to compromise Mrs. Keller's action by paying a sum within the policy limits of $10,000.

Fisher v. Fireman's Fund Indemnity Co., 244 F. 2d 194 (CCA 10).

Ritterbusch v. Sexsmith, 256 Wis. 507, 515, 41 N. W. 2d 611.

Wisconsin Zinc Co. v. Fidelity & Deposit Co. of Maryland, 162 Wis. 39, 155 N. W. 1081.

Berk v. *Milwaukee Automobile Insurance Co.*, 245 Wis. 597, 15 N. W. 2d 834.

Royal Transit Co., Inc. v. *Central Surety & Insurance Corp.*, 168 F. 2d 345 (CCA 7).

VI.

Under the rule established by this court, if the action is transferred to Oklahoma, the law of Oklahoma will apply.

Reynolds v. *Baltimore & Ohio R. Co.*, 185 F. 2d 27, 29 (CCA 7).

ARGUMENT.

I.

THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT HAS JURISDICTION TO GRANT THE PETITION FOR A WRIT OF MANDAMUS.

This court has had occasion in the past two years to determine the propriety of the granting of a writ of mandamus to a District Court under the provisions of the All Writs Act, 28 U. S. C., Sec. 1651(a). The first recent leading case is *Chicago R. I. & P. R. Co.* v. *Igoe*, 220 F. 2d 299 (CCA 7, 1955). In that case, Judge Igoe refused to transfer a case from Illinois to Iowa under the provisions of 28 U. S. C., Sec. 1404(a). The court, in an opinion written by Chief Judge Duffy, held, Judge Finnegan dissenting, that the court had power to require the trial court to enter an order for transfer. In the recent case of *LaBuy* v. *Howes Leather Co.*, 352 U. S. 249, 1 L. Ed. 2d 290, the United States Supreme Court interpreted the All Writs Act, 28 U. S. C., Section 1651(a). The majority of the court held that a Circuit Court of Appeals had the power to issue a writ of mandamus directed to a District Court. In the dissenting opinion of Mr. Justice Brennan, with whom Mr. Justice Frankfurter, Mr. Justice Burton, and Mr. Justice Harlan joined, Mr. Justice Brennan stated that there was a distinction between a case where the action of the trial judge in granting an order could be reviewed by a Circuit Court of Appeals and in a case where it would be impossible to secure such a review. At page 302 of 1 L. Ed. (2d), Justice Brennan stated that the focal question posed for a Court of Appeals by a petition issued for a writ of mandamus was whether the action of a District Court tended to frustrate or impede the

ultimate exercise by the Court of Appeals of its appellate jurisdiction granted in some other provision of the law. On this point, the Justice Brennan said, page 302 of 1 L. Ed. (2d):

> "The answer is clearly in the affirmative where, for example, the order of the District Court transfers a cause to a District Court of another circuit for decision. That was *Josephson*, where the Court of Appeals for the First Circuit held that an order of a District Court in the circuit transferring a case to the District Court of another circuit was within the reach of the Court of Appeal's power under the All Writs Act because 'the effect of the order is that the district judge has declined to proceed with the determination of a case which could eventually come to this court by appeal from a "final decision".' 218 F. 2d, at 181. In contrast, a District Court order denying a transfer would not come under the umbrella of power under the All Writs Act, since retention of the cause by the District Court can hardly thwart or tend to defeat the power of the Court of Appeals to review that order after final decision of the case."

In this case, the Order of Judge Grubb transfers the case to the District Court of the United States for the Northern District of Oklahoma which is outside the Seventh Circuit. The General Casualty Company of America therefore will be precluded from a review of the propriety of the Order of transfer unless this court grants an alternative writ of mandamus to determine the propriety of the Order.

Under the provisions of the All Writs Act, 28 U. S. Code, Sec. 1651(a), the decisions of this court and of the United States Supreme Court interpreting the statute, this court has jurisdiction to issue the writ of mandamus which the petitioner prays for.

II.

THE TRIAL COURT DID NOT HAVE JURISDICTION TO TRANSFER THE ACTION BECAUSE THE PLAINTIFF COULD NOT HAVE BROUGHT THE ACTION IN THE OKLAHOMA COURT TO WHICH THE TRIAL COURT ORDERED THE ACTION TRANSFERRED.

Mr. and Mrs. Keller based their motion to transfer the action from the District Court of the United States for the Eastern District of Wisconsin to the District Court of the United States for the Northern District of Oklahoma upon Sec. 1404(a) of Title 28, U. S. Code, which reads as follows:

> "(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

The statute authorizes the transfer of an action to a district court "where it might have been brought." The motion made by Mr. and Mrs. Keller recites that the action might have been brought in the District Court of the United States for the Northern District of Oklahoma. The question is whether the action "might have been brought" in the District Court in Oklahoma within the meaning of the statute. Judge Grubb in his memorandum decision held that "the question goes to venue." He held that the action might have been brought in Oklahoma because the defendants, Mr. and Mrs. Keller, consented to submit to the jurisdiction of the court in Oklahoma. On this point, Judge Grubb said:

> "* * * The basic principle involved is that by making this motion, the defendants consent to the jurisdiction of the District Court of Oklahoma and waive any objection that they might otherwise have on the ground that the action might not have been brought there because they could not normally be served there."

Judge Grubb relies upon the following decisions: *Paramount Pictures, Inc.* v. *Rodney, U. S. District Judge,* 186 F. 2d 111 (CCA 3); *Anthony* v. *Kaufman,* 193 F. 2d 85 (CCA 2); *In Re Josephson,* 218 F. 2d 174 (CCA 5). The Judge stated that these decisions are more authoritative and more logical than the decisions of the District Courts holding otherwise. Judge Grubb did not cite *Foster-Milburn Co.* v. *Knight,* 181 F. 2d 949, 952 (CCA 2), an opinion by Judge Learned Hand, or *Shapiro* v. *Bonanza Hotel Co.,* 185 F. 2d 777 (CCA 9).

The enactment of Sec. 1404(a) of Title 28, U. S. Code, was an outgrowth of the doctrine *forum non conveniens.* In *Norwood* v. *Kirkpatrick,* 349 U. S. 29, 32, Justice Minton, speaking for the United States Supreme Court, traced the history of Sec. 1404(a), as follows:

> "When Congress adopted sec. 1404(a), it intended to do more than just codify the existing law on forum non conveniens. As this Court said in *Ex parte Collett,* 337 U. S. 55-61, 93 L. ed. 1207-1211, 69 S. Ct. 944, 959, 10 A. L. R. 2d 921, Congress in writing sec. 1404(a), which was an entirely new section, was revising as well as codifying. The harshest result of the application of the old doctrine of forum non conveniens, dismissal of the action, was eliminated by the provision in sec. 1404(a) for transfer. When the harshest part of the doctrine is excised by statute, it can hardly be called mere codification. As a consequence, we believe the Congress, by the term 'for the convenience of parties and witnesses, in the interest of justice,' intended to permit courts to grant transfers upon a lesser showing of inconvenience. * * *"

The court, in its decision, plainly indicated that the fundamental principles of *forum non conveniens* still applied, page 32:

> "This is not to say that the relevant factors have

changed or that the plaintiff's choice of forum is not to be considered, but only that the discretion to be exercised is broader."

Justice Minton, page 32, cited with approval Moore, Commentary on the Judicial Code (1949 ed.), page 208. There is a helpful annotation in 99 L. Ed., commencing at page 799, immediately following the decision in *Norwood v Kirkpatrick*, 349 U. S. 29.

What are the fundamentals of the doctrine *forum non conveniens?* One of the relevant factors is that there must be two forums in which the defendant is amenable to process. In *Foster-Milburn Co.* v. *Knight*, 181 F. 2d 949, 952-953, Judge Learned Hand, speaking for the court, said, pages 952-953:

"'The revisers say that sec. 1404(a) 'was drafted in accordance with the doctrine of *forum non conveniens*,' and that doctrine always 'presupposes at least two forums in which the defendant is amenable to process.' (*Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501, 507, 67 S. Ct. 839, 842, 91 L. Ed. 1055). The same conclusion was expressed obiter in *Christopher* v. *American News Co.* (176 F. 2d 11 (CCA 7)), and Judge Rodney so decided in *Tivoli Realty Insurance Co.* v. *Paramount Pictures*, D. C., 89 F. Supp. 278."

The same thought was expressed by this Court in *Christopher* v. *American News Co.*, 176 F. 2d 11, 12-13 (CCA 7).

In *Shapiro* v. *Bonanza Hotel Co.*, 185 F. 2d 777 (CCA 9), the court held that the Congress, in enacting sec. 1404(a) of Title 28, U. S. Code, did not intend by the use of the word "brought" to change the rule of *forum non conveniens* which presupposes at least two forums in which the defendant is amenable to process. The court cited with approval *Wilson* v. *Seas Shipping Co., Inc.*, 78 F. Supp. 464 (D. C. Pa.), in which the court held that it would not, upon motion made by the defendant, transfer the action

to a district where the plaintiff could not obtain service on the defendant.

The foregoing decisions which discuss the doctrine of *forum non conveniens* rest upon the leading case of *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501, 506, where the court, speaking through Mr. Justice Jackson, said:

> "In all cases in which the doctrine of *forum non conveniens* comes into play, it presupposes at least two forums in which the defendant is amenable to process; *the doctrine furnishes criteria for* choice between them."

In *Paramount Pictures, Inc.* v. *Rodney*, 186 F. 2d 111 (CCA 3), relied upon by Judge Grubb, Judges McLaughlin and Hastie, in a dissenting opinion, stated that the doctrines of *forum non conveniens* presupposed two forums in which the defendant was amenable to process and if the Congress had not so intended, it would have omitted the concluding phrase "where it might have been brought" from sec. 1404(a) of Title 28, U. S. Code.

We have not found a single federal court decision in which the court did not adhere to the rule that there must be two forums in which the defendant is amenable to process where the motion for transfer has been made by the plaintiff in the action. Judge Tehan in *Rogers* v. *Halford*, 107 F. Supp. 295 (D. C. E. D. Wis., Sept. 16, 1952), refused to transfer a case to California on motion of the plaintiff. That was an action for damages arising out of an automobile accident which occurred in California. At the time of the accident, all of the parties resided in California. About three months after the accident, the defendant moved to Wisconsin where she continued to reside until the plaintiff had commenced the action. Judge Tehan held that upon the fact as presented, the court was of the belief that a sufficient showing had been made that the convenience of parties and witnesses and the interests of jus-

tice warranted transfer of the case as requested. Thereupon, the court stated, page 296:

> "Before a transfer can be ordered, however, the court, under a further provision of Section 1404(a) must make a determination that the district to which transfer of the action is sought is a district 'where it might have been brought'."

The court then called attention to the fact that the defendant was not amenable to process in California, and that it was obvious she was amenable to process in one forum only, Wisconsin, her place of residence (page 296).

After citing *Foster-Milburn Co.* v. *Knight*, 181 F. 2d 949, 951 (CCA 2), Judge Tehan concluded, page 294:

> "The doctrine of *forum non conveniens* has always presupposed 'at least two forums in which the defendant is amenable to process.' *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501, 507 * * * and there is no reason to believe that Congress in enacting Sec. 1404(a) intended to eliminate that prerequisite * * *. While it would seem that the interests of justice would be much better served by having the trial of this action in California, this Court does not believe that Sec. 1404(a) gives it the power to order the requested transfer."

Judge Chestnut, one of the great federal judges, made an exhaustive study of the question in *Mitchell* v. *Gandlach*, 136 F. Supp. 169 (D. C. Md.), and concurred in the opinion of Judge Tehan.

The most recent case on the subject which we have been able to find is *Ansche* v. *Sackheim*, 145 F. Supp. 447 (D. C. N. J.). In that case, the court emphasized (page 453) that an action may be transferred under Sec. 1404(a) only "to any other district where the action might have been brought." The court there held that the corporation "Around the World" could not be sued in New York under 28 U. S. C. A. 1391(c), and that therefore the action

could not be transferred from the District Court in New Jersey to the District Court in New York.

Under Section 1404(a), are there two rules which apply depending upon the party who moves for a transfer? May the defendant obtain a transfer of the action to a district in which he neither resides nor is amenable to service of process simply by stating that he will submit to the jurisdiction of the court to which the action is transferred? Judge Grubb answered this question in the affirmative. He held that although Mr. and Mrs. Keller were citizens and residents of the State of Wisconsin, he could transfer the action to the District Court of the United States for the Northern District of Oklahoma upon the statement made by counsel representing the Kellers that their clients would submit to the jurisdiction of the District Court of the United States for the Northern District of Oklahoma.

The leading case holding that upon the motion of the defendant there can be no transfer to a district where the defendant is not amenable to process is *General Electric Co.* v. *Central Transit Warehouse Co.*, 127 F. Supp. 817 (D. C. Mo. 1955). The decision in that case was written by Justice Whittaker of the United States Supreme Court when he was District Judge. The decision is so complete and yet so succinct that we have quoted from it at great length. In that case, Kansas City Terminal Warehouse Company, one of the defendants, moved to transfer the case to the Northern District of Iowa. In the original opinion, Justice Whittaker, then Judge Whittaker, stated that the motion to transfer was governed by Sec. 1404(a) of Title 28, U. S. Code. He stated it appeared that the Kansas City Terminal Warehouse Company, which was a Missouri corporation, was not licensed or authorized to do any business in Iowa and actually did not do any business in that state. In approaching the problem whether the court had authority to transfer the case to the District Court in the

Northern District of Iowa, Justice Whittaker said, page 824:

> "It follows that the first question—and, I think, the determinative question—here, is whether this action 'might have been brought' in the District Court of the United States for the Northern District of Iowa. The word 'brought', as used in the statute, is not synonymous with the word 'commenced' in the sense used in Rule 3 of Federal Rules of Civil Procedure, as the phrase 'where it might have been brought', as used in the statute, contemplates a forum having venue and in which jurisdiction of the parties could be acquired if the action were originally brought there. In *Greve v. Gibraltar Enterprises*, D. C. N. M., 85 F. Supp. 410, 412, the court answered the point in this way. 'First, the Court believes the language of the statute, "where it might have been brought", relates primarily to venue and in a proper case would include jurisdiction. It concerns plaintiff's right to institute the suit originally.' Judge Learned Hand, in *Foster-Milburn Co. v. Knight*, 2 Cir., 181 F. 2d 949, decided the point in the same way. He said, at page 951: 'We do not forget that an action is "commenced" when the complaint is filed; and it would follow, if it is "brought" whenever it is "commenced," that the plaintiff is right. The inference is, however, unwarranted that Rule 3 meant to assimilate the filing of a complaint to the service of a summons.' He concluded that the right to transfer an action 'presupposes at least two forums in which the defendant *is amenable to process.*'". (Emphasis mine.) Judge Fee, in *United States v. 11 Cases, etc., supra* (94 F. Supp. 927) decided the question in the same way, saying, in an action which could not have been originally brought in the district to which he was asked to transfer it, for want of venue and jurisdiction, the following: 'Since no statutory provision exists, this Court is without power to initiate the transfer.' To the same effect is *Burns v. Chubb*, D. C. E. D. Pa., 99 F. Supp. 581."

In holding that the court did not have the power to transfer the action, the court said, page 824:

"It is quite true that that part of this action which is embraced in Count I of the complaint, and which seeks relief only against defendant, CGW, could have been 'brought' in the Northern District of Iowa, and, likewise, that part of this action which is embraced in Count II of the complaint, and which seeks relief only against defendant, Central Transit, could have been 'brought' in the Northern District of Iowa; but that part of this action which is embraced in Counts III and IV of the complaint (which seeks relief only against defendant, Terminal), and that part which is embraced in Count V of the complaint (which seeks relief against all three defendants 'or against any one or more of them as the facts may warrant') could not have been 'brought' in the Northern District of Iowa for the simple reason that defendant, Terminal, is a Missouri corporation and not licensed or authorized to do business, and is not 'doing business', in Iowa, and the District Court for the Northern District of Iowa would not have any venue of the action, over defendant, Terminal, Section 1391(c), Title 28 U. S. C. A., nor, (for those reasons, and the fact that defendant, Terminal, has no office nor agent in Iowa upon whom service of process could be had), could that court have acquired jurisdiction over the defendant, Terminal. The fact that Central Transit, which is incorporated and doing business in Iowa, is a wholly owned subsidiary of defendant, Terminal, does not render that subsidiary a valid process agent in Iowa for defendant, Terminal. *Echeverry* v. *Kellogg Switchboard & Supply Co.*, 2 Cir., 175 F. 2d 900.

"This is one 'action'. I cannot divide it into parts and transfer some and keep others.

"For these reasons, this 'action' could not have been 'brought' in the District Court of the United States for the Northern District of Iowa, and, therefore, Section 1404(a), Title 28 U. S. C. A., does not authorize, but, on the contrary, prohibits, the transfer of this action to that jurisdiction."

On a motion for rehearing, Justice Whittaker concluded that the Kansas City Terminal Warehouse Company was doing business in Iowa, and hence the action could have been commenced in Iowa. Justice Whittaker adhered to his view that a case cannot be transferred to a district unless service could be had upon the defendant in that district. The language used by Justice Whittaker is so apropos that we will quote the entire statement made by the Justice on that point (P. 825-827):

> "Defendants have moved for a rehearing in respect of that portion of our memorandum and order of January 22, 1955, which denied their separate motions to transfer this cause to the District Court of the United States for the Northern District of Iowa, under the provisions of Section 1404(a), Title 28 U. S. C. A. contending, first, that the effect of the motion by defendant, Terminal, to transfer was to give its 'consent' to the venue of the Northern District of Iowa, and, they argue, that such 'consent' not only eliminated any question of venue in the transferee court, but, also, was sufficient to give personal jurisdiction to that court over the defendant, Terminal, and that any question respecting the phrase in that section limiting transfer to a district wherein the action 'might have been brought' is thereby overcome, citing *Paramount Pictures* v. *Rodney*, 3 Cir., 186 F. 2d 111, *Anthony* v. *Kaufman*, 2 Cir., 193 F. 2d 85, *Welch* v. *Esso Shipping Co.*, D. C. S. D. N. Y., 112 F. Supp. 611, and *Mire* v. *Esso Shipping Co.*, D. C. 112 F. Supp. 612, and contending, second, that under the averments of plaintiff's compiaint, particularly Counts III and V (alleging that Terminal operates the Oelwein, Iowa, warehouse 'in the name of its agent', Central Transit, and that the latter, in and about the handling, storage and damaging of these chattels, acted as 'the agent of defendant', Terminal, and that the two 'are one and the same', and that Central Transit is 'a mere adjunct, branch or instrumentality of' Terminal), this action 'might have been brought' against defendant, Termi-

nal, in the Northern District of Iowa, and that the matter of power in the court to transfer the cause thereto, under Section 1404(a), Title 28 U. S. C. A. should be determined upon the averments of plaintiff's complaint—which have not (as yet) been controverted by defendants, and which plaintiff is in no position to controvert—, and that the court should not attempt to resolve those tendered issues upon a motion to transfer.

"We now give attention to the first question presented. The crux of our holding, stated in the last page of our opinion, was that this action could not have been brought in the Northern District of Iowa against defendant, Terminal, because that court 'would not have had venue of this action over defendant, Terminal, nor could that court have acquired jurisdiction over the defendant, Terminal,' and, therefore the action could not have been brought in that district.

"We recognize, of course, that venue can be waived. So can jurisdiction over the person be waived. But does such a waiver of either or both, made after an action has been 'commenced' (by the mere filing of a complaint with the clerk in any district, see Fed. Rules Civ. Proc. Rule 3, 28 U. S. C. A.)—establish that the action 'might have been brought' there, in the sense of that phrase as used in Section 1404(a), Title 28 U. S. C. A.? If it does, what, if any, meaning is left to the phrase 'where it might have been brought,' as adopted by Congress and used in the statute? Would not such construction be to read that phrase entirely out of the statute? Would not such construction permit transfer of the action to any district desired by the moving defendants, though they, or some of them, could not have been served with process there, and no statutory venue existed there, and the action could not have been maintained there, without their intentional waiver of venue and entry of general appearance? I think no such treatment can be given to that phrase in the statute. It, says Judge Learned Hand, ' "presupposes at least two forums in which the defendant is amenable to

process'' '. *Foster-Milburn Co.* v. *Knight*, 2 Cir., 181 F. 2d 949, 952.

"We recognize that the third circuit, in *Paramount Pictures* v. *Rodney*, 3 Cir., 186 F. 2d 111, held—over two strong dissents—, in an antitrust case, that defendants' motion to transfer waived lack of venue in the transferee district, and, of course, it did, but did that subsequent waiver relate back, antecedently, to the time of the institution of the suit so that it can be said to have affected the matter of whether the action 'might have been brought' in the transferee district? The majority held so. I agree with the dissents and think not. But, in any event, that case does not hold that an action may be transferred to a district where there is neither venue nor amenability to process. Being an antitrust case, it was subject to both the venue and process provisions of Section 12 of the Clayton Act, Section 22, Title 15 U. S. C. A., which provides that 'any suit * * * under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business,' (this much, of course, deals only with venue) 'and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found' (the last sentence, of course, deals with service of process). Thus, while a corporate defendant, in such a case, may object to (or it may waive) venue over it, if it is not an inhabitant of or found in or doing business in, the district of suit (as several of the corporate defendants in that case were not—but the majority of the court held that their motion to transfer constituted a waiver of venue sufficient to satisfy the terms of Section 1404(a), Title 28 U. S. C. A.), yet, no question of amenability to process of the transferee court existed or could exist in that case, because the corporate defendants were, by virtue of the last sentence of Section 12 of the Clayton Act, subject to extraterritorial service of process 'wherever it (they) may be found.' This was carefully pointed out by Judge Biggs.

"We note that in *Anthony* v. *Kaufman*, 2 Cir., 193 F. 2d 85, 86, Judge Frank said 'But here, one defendant could have been served in the transferee district, while the other defendant, which could not there have been served, has joined in the application for, and thus consented to, the transfer. That consent is a waiver of lack of venue.' We agree that the motion to transfer was 'a waiver of lack of venue,' but we doubt that the waiver had any effect on the antecedent matter of whether the action 'might have been brought' in the transferee district. But, however that may be, we do not believe that a waiver of venue establishes that an action 'might have been brought' in a district where there was not only no statutory venue, but, moreover, where the defendant could not have been served with process.

"The opinions in *Welch* v. *Esso Shipping Co.* and *Mire* v. *Esso Shipping Co.*, *supra*, cite and rely upon *Paramount Pictures, Inc.* v. *Rodney*, *supra*, and *Anthony* v. *Kaufman*, *supra*, but we believe they misapply the law of those cases, particularly the *Paramount Pictures* case, and we respectfully disagree with them.

"We adhere to our original conclusion that a district court is without power to transfer a cause, under Section 1404(a), Title 28 U. S. C. A., to a district without statutory venue and wherein service of process could not have been had and involuntary personal jurisdiction acquired, because, under these circumstances, the action could not have been 'brought' in that district."

It is perhaps a work of supererogation to add anything to what Justice Whittaker so ably stated. He distinguished *Paramount Pictures, Inc.* v. *Rodney*, 186 F. 2d 111 (CCA 3) and *Anthony* v. *Kaufman*, 193 F. 2d 85 (CCA 2). He did not, however, cite *In Re Josephson*, 218 F. 2d 174 (CCA 1). Judge Johnson in *Gilpin* v. *Wilson*, 148 F. Supp. 493 (D. C. Ala., Feb. 12, 1957), states that the vitality of the decision in *In Re Josephson*, 218 F. 2d 174 (CCA 1) has been weakened by the fact that the defendant corporation is also subject to personal service in New Mexico. Furthermore, Judge

Johnson preferred to follow the decisions in *Foster-Milburn Co.* v. *Knight*, 181 F. 2d 949 (CCA 2), and *Shapiro* v. *Bonanza Hotel Co.*, 185 F. 2d 777 (CCA 9).

The late case of *Ex parte Blaski*, 245 F. 2d 737 (CCA 5, June 14, 1957), relied upon by Judge Grubb, cites the following cases as holding that even though a defendant moves for transfer, the court has no power to grant a motion for transfer where the defendants are not subject to service in the transferee district (page 738): *Hampton Theatres, Inc.* v. *Paramount Film Distributing Corp.*, 90 F. Supp. 645 (D. C. D. C. 1950); *Johnson* v. *Harris*, 112 F. Supp. 338 (D. C. Tenn.); *Sheridan* v. *Pan-American Refining Corp.*, 123 F. Supp. 81 (D. C. N. Y.); *General Electric Co.* v. *Central Transit Warehouse Co.*, 127 F. Supp. 817 (D. C. Mo.); *Mitchell* v. *Gundlach*, 136 F. Supp. 169 (D. C. Md.); *Felchlin* v. *American Smelting & Refining Co.*, 136 F. Supp. 577 (D. C. Cal.)

The court then said, page 738.

> "The rule which to us seems the better reasoned and which has been adopted by the majority of the courts, permits the transfer upon the motion or with the consent of the defendants even though they could not have been served with the process of the transferee court. *Paramount Pictures, Inc.* v. *Rodney*, 3 Cir., 1951, 186 F. 2d 111, certiorari denied 340 U. S. 953, 71 S. Ct. 572, 95 L. Ed. 687; *Anthony* v. *Kaufman*, 2 Cir., 1951, 193 F. 2d 85, certiorari denied 342 U. S. 955, 72 S. Ct. 629, 96 L. Ed. 710; *In re Josephson*, 1 Cir., 1954, 218 F. 2d 174; *Torres* v. *Walsh*, 2 Cir., 1955, 221 F. 2d 319."

In commenting upon *In Re Josephson*, 218 F. 2d 174 (CCA 1), the court stated that the interpretation of the phrase "where it might have been brought" as used in 28 U. S. Code, sec. 1404(a), was discussed at length by Chief Judge Magruder and that consequently the court would not enter into a further discussion of that point.

In *Blackmar* v. *Guerre*, 190 F. 2d 427 (CCA 5), affirmed 342 U. S. 512, the court held that with respect to the action decided, it could not have been transferred under Section 1404(a) of Title 28, U. S. Code to the District of Columbia because a defendant was a resident of Louisiana.

Most of the decisions interpreting sec. 1404(a) of Title 28, U. S. Code, may be found in the annotations in 5 ALR 2d 1239, and 10 ALR 2d 932.

The effect of the decision of Judge Grubb in permitting the transfer may be illustrated by the decision in *Chicopee Manufacturing Corp.* v. *Kendall Co.*, 154 F. Supp. 248. In that case, the plaintiff brought an action in the District Court of the United States for the Western District of South Carolina. The defendant moved to transfer the case to the United States District Court for the District of Massachusetts. The action was brought for the infringement of a patent. It appeared that the plaintiff would use nine witnesses, seven of whom resided in Florida and two in South Carolina. The defendant intended to call five witnesses from Massachusetts, one from New Jersey, one from Georgia, one from St. Paul, Minnesota and one from North Carolina. The court refused to transfer the action. Under Judge Grubb's decision, the court could have transferred the action from South Carolina to Massachusetts, New Jersey, Georgia, Minnesota and North Carolina, depending upon the whim of the defendant as to a satisfactory forum.

We summarize this section of our brief in the words of Justice Whittaker in *General Electric Co.* v. *Central Transit Warehouse Co.*, 127 F. Supp. 817 (D. C. Mo.), page 825:

> "For these reasons, this 'action' could not have been 'brought' in the District Court of the United States for the Northern District of Iowa, and, therefore, Section 1404(a), Title 28 U. S. C. A., does not authorize, but, on the contrary, prohibits, the transfer of this action to that jurisdiction."

III.

JUSTICE REQUIRES THAT THE ACTION REMAIN IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

Sec. 1404(a), Title 28, U. S. Code, conferred broad discretionary power upon the court. We shall not labor the point that Judge Grubb did have the power to exercise a sound discretion in ordering the transfer of the action to the place where the material witnesses resided and where the underlying events took place. Judge Grubb did not refer to the principal underlying event which was the issuance of the insurance policy in Wisconsin. Because the policy was issued in Wisconsin, if the case remained in the District Court of the United States for the Eastern District of Wisconsin, Wisconsin law would govern, both with respect to the question of lack of cooperation under the policy and with respect to the exercise of good faith in failing to compromise Mrs. Keller's action by the payment of a sum within the policy limits of $10,000. *Fisher* v. *Firemen's Fund Indemnity Company*, 244 F. 2d 194 (CCA 10); *Ritterbusch* v. *Sexsmith*, 256 Wis. 507, 515, 41 N. W. 2d 611; *Wisconsin Zinc Co.* v. *Fidelity & Deposit Co. of Maryland*, 162 Wis. 39, 155 N. W. 1081, Annotated Cases 1918C, 399; *Hilker* v. *Western Automobile Insurance Co.*, 204 Wis. 1, 235 N. W. 413; *Lanferman* v. *Maryland Casualty Co.*, 222 Wis. 406, 267 N. W. 300; *Berk* v. *Milwaukee Automobile Insurance Co.*, 245 Wis. 597, 15 N. W. 2d 834; *Royal Transit Co., Inc.* v. *Central Surety & Insurance Corp.*, 168 F. 2d 345 (CCA 7).

Assuming that Mrs. Keller had brought an action against her husband in the District Court of the United States for the Eastern District of Wisconsin to recover damages because of injuries which she sustained in Oklahoma, upon motion by the defendant to transfer the action to the Dis-

trict Court of the United States for the Northern Distri
of Oklahoma, the court should grant the motion. Oklahom
law would govern the trial, both as to substantive law an
procedure, and an Oklahoma judge would pass upon th
Oklahoma law questions.

In this case, the insurance policy was issued in Wisconsin
and under the authorities cited, if the case remained i
Wisconsin, Wisconsin law would control. If the action i
transferred to Oklahoma, Mr. and Mrs. Keller will undoubt
edly contend that the Oklahoma law applies, in view of the
mandate in *Erie R. Co. v. Tompkins*, 304 U. S. 64.

Brainerd Currie, in an article in 22 University of Chicago
Law Review 405 entitled "Change of Venue and the Con
flict of Laws," has focused attention upon the problems
which will arise in the transfer of actions under Section
1404(a) of Title 28, U. S. Code. Among other things, he
states, page 411:

> "There is virtually no precedent in Anglo-American
> judicial history for change of venue from a court bound
> to apply one body of law to another bound to apply a
> different body of law."

Some of the facets of the problem may be gleaned from the
decision in *Drinan v. A. J. Lindeman & Hoverson Co.*, which
was first reported in 202 F. 2d 271 (CCA 7) and was again
reported in 238 F. 2d 72 (CCA 7, 1956).

One of the perplexing problems was presented in *Head
rick v. A. T. & S. F. Ry. Co.*, 182 F. 2d 305 (CCA 10). In
that case, the trial court entered an order of transfer from
the District Court of New Mexico to a district court in
California. The statute of limitations had not run in New
Mexico, but had run in California. The Circuit Court of
Appeals reversed the order of the trial court and ordered
the court to make a further inquiry with respect to the
statute of limitations. The court did observe that in the

event the case was tried in California, the New Mexico law would apply and the plaintiff's action would not be barred by the statute of limitations in California.

This court has adopted a contrary rule. In *Reynolds* v. *Baltimore & Ohio R. Co.*, 185 F. 2d 27, 29 (CCA 7), the plaintiff commenced his action in the District Court of the United States for the Northern District of Illinois. Upon motion of the defendant, the court transferred the action to the District Court of the United States for the Southern District of Indiana. The court, in holding that the law of Indiana applied, said, page 29:

> "Since federal jurisdiction in this case depends on diversity of citizenship, we must decide it in accordance with the law of Indiana. Under that law, plaintiff as a prerequisite to recovery is required to show that at the time and place of the accident he was in the exercise of due care and caution for his own safety, or in other words, that he was free from negligence which contributed to cause the accident."

Judge Kaufman, in an article entitled "Transfers Under the New Judicial Code", 10 FRD 595, 600-601 comments upon *Headrick* v. *A. T. & S. F. Ry. Co.*, 182 F. 2d 305 (CCA 10), and *Reynolds* v. *Baltimore & Ohio R. Co.*, 185 F. 2d 27, 29 (CCA 7).

Mr. Justice Jackson, in his dissenting opinion in *Wells* v. *Simonds Abrasive Co.*, 345 U. S. 514, 522, outlines in bold strokes the perplexing problems which will arise in cases which are transferred on the basis of *forum non conveniens*.

In view of the reasons advanced by Judge Grubb for the transfer of the action to the District Court of the United States for the Northern District of Oklahoma, we submit that no sufficient showing has been made warranting the transfer.

CONCLUSION.

In conclusion, we submit that Wisconsin law should control in the determination of the issues raised by the petitioner's complaint. The trial court had no jurisdiction to transfer the action to the District Court of the United States for the Northern District of Oklahoma because Mr. and Mrs. Keller were not amenable to process in the transferee district. Since the court has jurisdiction to grant a writ of mandamus to prevent the action from being transferred, we respectfully submit that the writ should be granted.

Respectfully submitted,

SUEL O. ARNOLD AND
DOUGHERTY, ARNOLD, PHILIPP & MURRAY,
Attorneys for Petitioner.

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Order of Respondent Transferring the Cause entitled General Casualty Company of America *vs.* Gustave F. Keller and Helene E. Keller pending in the District Court of the United States for the Eastern District of Wisconsin, to the District Court of the United States for The Northern District of Oklahoma.

IN THE UNITED STATES DISTRICT COURT

For the Eastern District of Wisconsin.

General Casualty Company of America, *Plaintiff*, *vs.* Gustave F. Keller and Helene E. Keller, *Defendants*.	Civil Action No. 57-C-124.

ORDER.

The defendants, Gustave F. Keller and Helene E. Keller, having filed a motion to transfer this cause for trial to the United States District Court for the Northern District of Oklahoma, sitting at Tulsa, Oklahoma, pursuant to the provisions of 28 U. S. C. A. 1404; and this court, having considered the motion, briefs of counsel and oral argument, finds that this cause should be transferred to said district for the convenience of the parties and witnesses and in the interest of justice.

It Is Therefore Ordered that this cause is hereby transferred for trial to the United States District Court for the Northern District of Oklahoma, sitting at Tulsa, Oklahoma.

It Is Further Ordered that the clerk of this court transmit to the clerk of the aforesaid District Court all of the papers

filed with him in this proceeding, and a copy of his docket thereon and a certified copy of this Order.

It Is Further Ordered that defendants be allowed fifteen days to answer the complaint after written notice to defendants that the papers in this action have been filed and that this action is now pending in the United States District Court for the Northern District of Oklahoma.

It Is Further Ordered that the motion of plaintiff to advance cause and for a temporary injunction is hereby denied without prejudice to the renewal of the motion in the United States District Court for the Northern District of Oklahoma.

Kenneth Grubb,
Chief Justice, U. S. District Court.

Approved as to Form:

/s/ Joe Francais,
Attorney for Gustave F. Keller.

/s/ S. M. Eisenberg,
Attorney for Helene E. Keller.

/s/ Suel O. Arnold,
Attorney for General Casualty Company of America.

Opinion of Respondent Ordering Action Entitled General Casualty Company of America *vs.* Gustave F. Keller and Helene E. Keller Pending in the U. S. District Court for the Eastern District of Wisconsin Transferred to the U. S. District Court for the Northern District of Oklahoma.

UNITED STATES DISTRICT COURT

Eastern District of Wisconsin.

General Casualty Company of America, a foreign corporation, *Plaintiff*, *vs.* Gustave F. Keller and Helene E. Keller, *Defendants.*	Civil Action No. 57-C-124.

OPINION.

This matter is before the court on two motions: (1) A motion of defendants to transfer this cause for trial to the United States District Court for the Northern District of Oklahoma, and (2) A motion of plaintiff for temporary injunction and an order advancing the action for trial.

The complaint grounds jurisdiction on diversity of citizenship, the plaintiff being a Washington corporation, defendants being citizens and residents of Wisconsin. The complaint is for a declaratory judgment. In brief it sets out that defendant Gustave Keller was the holder of a policy of automobile liability insurance issued by the plaintiff; that in October 1952, while the policy was in effect, the defendant Helene Keller, while a passenger in the automobile of defendant Gustave Keller, received injuries on U. S. Highway 66 in the state of Oklahoma in a collision with a

truck; that defendant Gustave Keller gave plaintiff a statement concerning the accident; that in 1954 defendant Helene Keller brought a suit against Gustave Keller and others in the state court in Oklahoma. That the plaintiff performed all the conditions of the policy; that the defendant Gustave Keller failed and refused to comply with the conditions of the policy and to cooperate with the plaintiff, and demanded on the day of trial of the case in the state court of Oklahoma that plaintiff settle the claim of defendant Helene Keller within the policy limits; that because of the failure of defendant Gustave Keller to comply with the terms of the policy, plaintiff is relieved of liability to defendant Gustave Keller under the policy and demands that the court declare that there is no liability of the plaintiff to the defendant Gustave Keller on the policy. That defendant Helene Keller procured a verdict in the state court of Oklahoma and is, therefore, a proper defendant in this action.

Defendants have not answered, but have stated at the time of oral arguments on the various motions and have set forth in their briefs that they, or at least one of them, intend to file a counter-claim alleging bad faith on the part of the plaintiff and negligence in the conduct of the defense and in failing to settle with defendant Helene Keller, and demanding judgment for the excess of the amount of the judgment obtained by Helene Keller in the Oklahoma action over and above the limits of protection afforded by the policy issued.

It appears from the motion papers and pleadings that not only did the accident occur in the state of Oklahoma, but the trial on the merits of the case between the defendant Helene Keller, as plaintiff, and the defendant Gustave Keller, *et al.*, as defendants, was had in Oklahoma. It further appears that the attorneys who represented each of the parties to that action are residents of Oklahoma; the witnesses who testified at the trial, including police officers,

the court reporter who took the testimony at the trial, in fact, all persons who might give material testimony in this controversy, are residents of Oklahoma with the exception of the two defendants, who are residents of Wisconsin. The defendants have joined in the motion to transfer the cause under 28 U. S. C. A. §1404 for the convenience of the parties and witnesses and in the interest of justice.

The court finds that it would be for the convenience of witnesses and in the interest of justice to have this action tried in Oklahoma. Aside from the defendants, who wish the case transferred, the record shows that there are no witnesses in Wisconsin and none outside of the state of Oklahoma. It is defendants' position that they will be subject to hardship in presenting the testimony of the Oklahoma witnesses in Wisconsin. There is no showing by the plaintiff of any substantial reason why this action should remain in the state of Wisconsin.

The court is of the opinion that there is every logical reason why the motion to transfer should be granted if the court has power to grant the motion. Defendants, if not restrained by this court, have the right to bring an action against the plaintiff in Oklahoma on the policy, defendant Helene Keller for payment of the judgment she has taken against the defendant Gustave Keller (assuming it has not been paid, and the record is silent on that point), and the defendant Gustave Keller for enforcement of his policy and for any claim that he may have for damages because of any alleged violation or breach of the terms of the policy by the plaintiff. Plaintiff fears the bringing of such actions in Oklahoma and that is the basis of plaintiff's motion for temporary injunction.

The court feels that the defendants have a right to bring action on this policy of insurance in Oklahoma, where the material witnesses reside and where the underlying events took place, if defendants so desire. Plaintiff's motion for

temporary injunction or restraining order is hereby denied without prejudice to the renewal of the motion in the United States District Court for the Northern District of Oklahoma.

With reference to the motion to transfer the cause under 28 U. S. C. A. #1404, the court finds that the convenience of witnesses and all of the parties, other than the plaintiff, and the interests of justice would be served if that motion is granted.

Section 1404(a) reads as follows:

> "(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

The District Court in Oklahoma has jurisdiction over the subject-matter of the action; it is a transitory cause of action. The District Court in Oklahoma has jurisdiction *in personam* over the defendants if the defendants voluntarily make a general appearance in an action pending in that court. It is claimed that the action might not have been brought against the defendants in Oklahoma for the reason that they are residents of Wisconsin and service could not be obtained on them in Oklahoma. Obviously, service could have been obtained on them in Oklahoma if they were found there. It is the view of the court that the question goes to venue. Section 1404 relates to change of venue.

There have been cited to the court and the court found only three cases decided by Courts of Appeals on this question. Those cases are: *Paramount Pictures, Inc.* v. *Rodney, U. S. District Judge*, 186 F. 2d 111 (C. A. 3). As stated by Chief Judge Biggs in that opinion, "A venue statute gives a 'personal privilege' to a defendant which he may assert or waive at his election. *Commercial Casualty Ins. Co.* v. *Consolidated Stone Co.*, 278 U. S. 177, * * * *Anthony*

v. *Kaufman*, 193 F. 2d 85 (C. A. 2), and *In re Josephson*, 218 F. 2d 174 (C. A. 1). In the latter case, the problem is analyzed in great detail. It would serve no purpose for this court to re-analyze the analysis made by the Court of Appeals in that decision. The basic principle involved is that by making this motion, the defendants consent to the jurisdiction of the District Court of Oklahoma and waive any objection that they might otherwise have on the ground that the action might not have been brought there because they could not normally be served there.

Counsel for the defendants also urge that this action could have been brought in Oklahoma because it involves the use of public highways of that state by a non-resident of that state. 47 O. S. A. §391, being the Non-resident Motorist Statute, is concerned with obtaining process in cases involving automobile accidents, and particularly paragraph (b) of that statute which covers "all summons or original notices of suit pertaining to such actions and proceedings, * * *" Neither counsel have cited any Oklahoma decision construing this statute in that regard. There is no showing that the defendant Helen Keller operated an automobile in Oklahoma and thereby came under the statute. There is authority in some jurisdictions that, under their particular Non-resident Motorist Statutes, actions can be brought on contracts for indemnification and actions by one tort feasor against another for contribution. *Dart Transit Co., Inc.* v. *Wiggins*, 117 N. E. 2d 314 (Ill.); *McKay* v. *Citizens' Rapid Transit Co.*, 59 S. E. 2d 121 (Va.); Contra: *Secured Casualty Insurance Co.* v. *Sinelnikoff*, 152 N. Y. S. 2d 15.

The court feels that because defendant Helene Keller is not shown to have driven an automobile on the highways of Oklahoma and because the Oklahoma statute is narrower than some of the others, that this would not be

grounds for getting service on both defendants in this action in Oklahoma under its Non-resident Motorist Statute.

Counsel for defendant Gustave Keller is directed to prepare an order in conformity with this decision, submitting it to plaintiff's counsel and counsel for the defendant Helene Keller for approval as to form only.

Dated, Milwaukee, Wisconsin, this 10th day of September, 1957.

K. P. Grubb,
U. S. District Judge.

9/24/57—Petitioner Filed Petition for Writ of Mandamus Directed to Respondent—

(Formal Parts Omitted)

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

No. ____.

General Casualty Company of America, a corporation,
Petitioner,

vs.

The Honorable Kenneth P. Grubb, Judge of the United States District Court for the Eastern District of Wisconsin,
Respondent.

PETITION FOR A WRIT OF MANDAMUS

The petitioner respectfully states and shows to the court:

(1) The petitioner is a corporation organized under the laws of the State of Washington and is licensed to transact the business of insurance in the State of Wisconsin.

(2) The respondent is one of the judges of the District Court of the United States for the Eastern District of Wisconsin.

(3) On the 1st day of June, 1957, the petitioner filed a complaint in the office of the Clerk of the District Court of the United States for the Eastern District of Wisconsin. A copy of the complaint, marked Exhibit "A", is attached to and forms a part of this petition. The U. S. Marshal served the complaint upon the defendants Gustave F. Keller and Helene E. Keller on the 5th day of June, 1957.

(4) The defendants in such action, Gustave F. Keller and Helene E. Keller, have not served or filed an answer to the complaint of the petitioner.

(5) On the 19th day of June, 1957, one of the defendants in such action, Helene E. Keller, filed a motion to transfer the action to the United States District Court for the Western District of Oklahoma. A copy of such motion, marked Exhibit "B", is attached to and forms a part of this petition.

(6) On the 19th day of June, 1957, one of the defendants in such action, Gustave F. Keller, filed a motion to transfer the action to the United States District Court for the Western District of Oklahoma. A copy of such motion, together with the supporting affidavit of Joe Francis, the attorney for the defendant, Gustave F. Keller, marked Exhibit "C", is attached to and forms a part of this petition.

(7) On the 8th day of July, 1957, the petitioner filed in the office of the Clerk of the District Court of the United States for the Eastern District of Wisconsin a motion for a temporary injunction and for an order advancing the action for trial. A copy of such motion, together with a supporting affidavit, marked Exhibit "D", is attached to and forms a part of this petition.

(8) The respondent ordered the respective parties to

file briefs in connection with such motions to transfer, and the respondent ordered oral arguments on Friday, August 23, 1957.

(9) The respective parties orally argued such motions on August 23, 1957, and upon suggestion of counsel for the petitioner that the venue of the action brought by Helene E. Keller in the State of Oklahoma was laid in the Bristow Division of the Superior Court of the State of Oklahoma, which was in the Northern District of Oklahoma, and not in the Western District of Oklahoma, the respondent, upon motions made by the attorneys representing such defendants Helene E. Keller and Gustave F. Keller, amended the motions to transfer to recite that the transfer should be made to the District Court of the United States for the Northern District of Oklahoma and not to the District Court of the United States for the Western District of Oklahoma.

(10) On the 10th day of September, 1957, the respondent filed an opinion granting the motions of the defendants Gustave F. Keller and Helene E. Keller to transfer the action to the Northern District of Oklahoma and denying the motion of the petitioner for a temporary injunction. A copy of such opinion, marked Exhibit "E", is attached to and forms a part of this petition.

(11) The respondent, on the 23rd day of September, 1957, filed an order for transfer of the action to the District Court of the United States for the Northern District of Oklahoma. A copy of such order, marked Exhibit "F", is attached to and forms a part of this petition.

(12) The defendants in such action, Gustave F. Keller and Helene E. Keller, are citizens and residents of the State of Wisconsin. The petitioner is a citizen of the State of Washington. The amount in controversy exceeds, exclusive of interest and costs, the sum of $3,000. The District Court of the United States for the Eastern District of

Wisconsin, has jurisdiction in the action pending in that court.

(13) Section 1404(a) of Title 28, U. S. Code, under which the respondent ordered the transfer of such action, provides that for the convenience of parties and witnesses and in the interests of justice, a judge of a district court may transfer any civil action to any other district "where it might have been brought."

(14) Section 1391, 28 U. S. Code, provides that a civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the jurisdictional district where all plaintiffs or all defendants reside.

(15) The defendants in such action, Gustave F. Keller and Helene E. Keller, are citizens of the State of Wisconsin and reside in the City and County of Milwaukee, State of Wisconsin. The petitioner could not maintain suit against such defendants Gustave F. Keller and Helene E. Keller in the District Court of the United States for the Northern District of Oklahoma because such defendants did not reside in Oklahoma and in that district.

(16) The motions to transfer the action recite that the action "might have originally been brought" in the District Court of the United States for the Western District of Oklahoma. In the briefs filed by counsel for the defendants Gustave F. Keller and Helene E. Keller, the statement was made that the defendants Gustave F. Keller and Helene E. Keller would consent to submit to the jurisdiction of the United States District Court for the Western District of Oklahoma, and at the time of the oral argument, counsel for the defendants Gustave F. Keller and Helene E. Keller stated in open court that they would consent to have their clients submit to the jurisdiction of the District Court of the United States for the Northern District of Oklahoma. Aside from such statements, there is

nothing in the record to show such voluntary submission to the jurisdiction of the District Court of the United States for the Northern District of Oklahoma.

(17) The Circuit Court of Appeals for the Seventh Circuit has not passed upon the question whether, within the meaning of Section 1404(a), an action may be brought in a District Court of the United States upon the agreement of the defendants requesting a transfer of the action to submit to the jurisdiction of the court to which the transfer is sought. The respondent cites *Paramount Pictures, Inc.* v. *Rodney*, 186 F. (2d) 111 (CCA 3), *Anthony* v. *Kaufman*, 193 F. (2d) 85 (CCA 2), and *In Re Josephson*, 218 F. (2d) 174 (CCA 1). The court refused to follow the decision of Judge Whittaker, now Justice of the United States Supreme Court in *General Electric Co.* v. *Central Transit Warehouse Co.*, 127 F. Supp. 817 (D. C. Mo. 1955).

(18) The order entered by the respondent transferring the action to the District Court of the United States for the Northern District of Oklahoma is not an appealable order under Section 1291 of Title 28, U. S. Code. The petitioner has no remedy except by a writ of mandamus to compel the respondent to retain jurisdiction in the action and to award whatever relief the court may determine the petitioner to be entitled to

(19) This court has jurisdiction to issue a writ of mandamus under the decisions in *Chicago R. I. & P. R. Co.* v. *Igoe*, 220 F. (2d) 299 (CCA 7, 1955); *Howes Leather Co.* v. *LeBuy*, 226 F. (2d) 703 (CCA 7), and *LaBuy* v. *Howes Leather Co.*, 352 U. S. , 1 L. Ed. (2d) 290.

Wherefore, the petitioner, General Casualty Company of America, prays for a writ of mandamus to issue out of this Honorable court directed to the Honorable Kenneth P. Grubb, Judge of the District Court of the United States for the Eastern District of Wisconsin, to compel the District Judge to vacate the order transferring the action to

the District Court of the United States for the Northern District of Oklahoma, and to retain jurisdiction of such action for the purpose of adjudicating the issues raised by the complaint of the petitioner.

General Casualty Company of America,
Petitioner.

By /s/ Suel O. Arnold,
710 N. Plankinton Avenue,
Milwaukee 3, Wisconsin,
Attorney for Petitioner.

State of Missouri,
County of } ss.

J. W. Malloy, being first duly sworn, on oath deposes and says that he is the Claims Manager of the petitioner; that he had read the foregoing petition and knows the contents thereof and that the same is true to the best of his knowledge, information and belief, except as to the date and entry of the order referred to in paragraph 11 of the Petition; that the reason why this petition is not verified by the petitioner is because it is a corporation organized under the laws of the State of Washington; that the affiant as such officer of such corporation is acquainted with the facts because he has been in charge of the matters referred to in the petition and his knowledge is based upon the reports of employees of the corporation and the attorneys representing the corporation.

/s/ J. W. Malloy.

Subscribed and sworn to before me this 13 day of September, 1957.

/s/ S. Renzenhausen,
Notary Public, St. Louis City, Mo.

My commission expires: May 4, 1960.

State of Wisconsin,
County of Milwaukee. } ss.

John A. Hanna, being first duly sworn, on oath deposes and says that he is the Milwaukee Claims Manager of the petitioner; that he has read the foregoing petition and knows the contents thereof and that the same is true to the best of his knowledge, information and belief; that the reason why this petition is not verified by the petitioner is because it is a corporation organized under the laws of the State of Washington; that affiant as such officer of such corporation is acquainted with the facts referred to in the petition and that his knowledge is based upon the reports of employees of the corporation and the attorneys representing the corporation.

/s/ John A. Hanna.

Subscribed and sworn to before me this 23 day of September, 1957.

/s/ Suel O. Arnold,
Notary Public, Milwaukee Co., Wis.

My commission expires: Nov. 9, 1958.

Exhibit "A" of Petition.

IN THE UNITED STATES DISTRICT COURT

For the Eastern District of Wisconsin.

General Casualty Company of America, a foreign corporation, *Plaintiff*, *vs.* Gustave F. Keller and Helene E. Keller, *Defendants.*	Civil Action No. 57-C-124

COMPLAINT.

(1) The plaintiff, General Casualty Company of America, is a corporation organized under the laws of the State of Washington, and is licensed to transact the business of insurance in the State of Wisconsin.

(2) The defendant, Gustave F. Keller, is a citizen and resident of the State of Wisconsin, and resides at 5895 North Witte Lane, in the City and County of Milwaukee, State of Wisconsin.

(3) The defendant, Helene E. Keller, is a citizen and resident of the State of Wisconsin, and resides at 5895 North Witte Lane, in the City and County of Milwaukee, State of Wisconsin.

(4) The defendants are husband and wife.

(5) Jurisdiction of the court is founded on diversity of citizenship and amount. The plaintiff, as a corporation organized under the laws of the State of Washington, is a citizen of the State of Washington. The defendants are citizens of the State of Wisconsin. The matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000.

(6) This is a case of actual controversy within the jurisdiction of the court which does not relate to federal taxes and in which the plaintiff requests the court to declare the rights and other legal relations of the parties under the provisions of the Federal Declaratory Judgments Act, under Title 28 of the United States Code, Section 2201, and Rule 57, Federal Rules of Civil Procedure.

(7) Before October 15, 1952, the defendant, Gustave F. Keller, applied for and received from the plaintiff a policy of automobile liability insurance, No. CA142068 covering a 1950 Buick automobile owned by the defendant, Gustave F. Keller. The policy of insurance provided coverage to the defendant, Gustave F. Keller, against liability imposed by law for the negligent operation of such automobile, subject to the terms and conditions of the policy.

(8) On October 15, 1952, and while the policy of automobile liability insurance issued by the plaintiff to the defendant, Gustave F. Keller, was in effect, the defendant, Helene E. Keller, was a passenger in the 1950 Buick automobile owned by the defendant, Gustave F. Keller. At the time that the defendant, Helene E. Keller, was a passenger in her husband's automobile and while the defendant, Gustave F. Keller, was operating his automobile on U. S. Highway 66 in the State of Oklahoma, the Buick automobile collided with a truck approaching from the opposite direction. The collision caused personal injuries to the defendant, Helene E. Keller.

(9) On the 16th day of October, 1952, the defendant, Gustave F. Keller, gave a statement to the plaintiff, a copy of which, marked Exhibit "A", exclusive of the diagrams drawn by the defendant, Gustave F. Keller, is attached to and forms a part of this complaint. (Such statement indicates upon its face that the collision between the automobile operated by the defendant, Gustave F. Keller, and the truck, did not result from the negligence of the defendant, Gustave F. Keller.)

(10) In the year 1954, the defendant, Helene E. Keller, brought a suit against the defendant, Gustave F. Keller, and others in a state court in the State of Oklahoma. The suit was dismissed as against one co-defendant, but was prosecuted as against the defendant, Gustave F. Keller, and another defendant resulting in a verdict in favor of the plaintiff, Helene E. Keller, against the defendant, Gustave F. Keller, and another.

(11) The plaintiff fully performed all of the terms and conditions of the automobile liability insurance policy, including the provision of such policy requiring the plaintiff to furnish a defense to the defendant, Gustave F. Keller.

(12) Upon information and belief, the plaintiff alleges that the defendant, Gustave F. Keller, failed and refused to comply with the terms and conditions of the policy of automobile liability insurance which imposed upon the defendant, Gustave F. Keller, the duty to cooperate with the plaintiff and to assist the plaintiff in effecting settlements and in securing and giving evidence. Such failure and refusal consisted, among other things, in failing to inform the plaintiff of all the facts and circumstances in connection with the collision between the Buick automobile and the truck as the defendant, Gustave F. Keller, claimed such facts to be at the time of the trial of the action in Oklahoma at which the defendant, Gustave F. Keller, testified as a witness on his own behalf, in failing and refusing to assist in the settlement of the claim of Helene E. Keller in such state court action, in demanding on May 22, 1957, on the day that the trial in the state court commenced, that the plaintiff settle the claim of Helene E. Keller within the policy limits of Ten Thousand and no/100 ($10,000.00) Dollars as indicated by the demand in writing, a copy of which, marked Exhibit "B", is attached to and forms a part of this complaint.

(13) Such failure and refusal on the part of the defendant, Gustave F. Keller, to comply with the terms and

conditions of such automobile liability policy constituted a breach of the contract existing between the plaintiff and the defendant, Gustave F. Keller, and by reason of such breach of contract, the plaintiff is under no liability to the defendant, Gustave F. Keller, on account of the issuance of such automobile liability insurance policy to the defendant, Gustave F. Keller.

(14) Because of such breach of contract by the defendant, Gustave F. Keller, the plaintiff demands that the court declare that there is no liability of the plaintiff to the defendant on account of the issuance of such policy of automobile liability insurance.

(15) The defendant, Helene E. Keller, by reason of having secured a verdict in the action brought in the state court of the State of Oklahoma is a proper party defendant in this action.

Wherefore, the plaintiff demands judgment determining the rights, duties, obligations and liabilities, if any, of the parties to this action; that the court declare and determine that the plaintiff has no obligation or liability to the defendants, or either of them; that the court determine and declare that the terms and conditions of the policy of automobile liability insurance issued by the plaintiff to the defendant, Gustave F. Keller, were breached by the defendant, Gustave F. Keller, and that because of such breach the court should declare that the insurance policy was null and void and of no force and effect and that the court grant such other and further equitable relief as to the court shall seem proper.

Suel O. Arnold and
Dougherty, Arnold, Philipp & Murray,
of Counsel.
By /s/ Suel O. Arnold,
Attorneys for Plaintiff,
710 North Plankinton Avenue,
Milwaukee 3, Wisconsin.

Exhibit "A" Attached to Complaint.

10/16/51,
Glendale Hospital,
Stroud, Okla.

I am Gustave F. Keller, age 53, married and reside with my wife and daughter, Irene, at 5547 North Milwaukee River Parkway, Milwaukee, Wisconsin. I own and operate a 1950 Buick Sedan. On the 15th day of October, 1952 I was involved in an accident with this vehicle and to the best of my recollection this accident happened in the following manner. Myself, my wife and my daughter were enroute home from a vacation trip. We were heading east on U. S. Highway 66. We had passed through Stigud, Oklahoma at a point about three miles east where the accident occurred. The weather was clear and the pavement dry. I was driving, my wife, Helene, was seated in the front seat to my right and my daughter was seated in the rear seat on the right hand side. I noticed a sign on the shoulder to the right saying for drivers to be cautious as trucks were entering the highway area. There was a car ahead of me at a distance of about 100 feet. Both this car and my car were traveling at about 35-40 m.p.h. We rounded a right hand curve and were going just about due east. I noticed a truck stopped dead in the road. This truck was westbound and preparing to turn left off the highway into a lane from which they were hauling dirt or gravel or something. This truck stayed where it was until after the car ahead had gone by. Then the truck pulled right across the road in front of me. I looked to my right and saw one truck headed south just south of the embankment to the south side of the highway. There was no room to swerve to the right and avoid the truck turning left in front of me. I braked my car and turned sharply to the left. The car started to lean sharply and I had to release

the pressing on the brakes. The car swung completely around and hit the side of the embankment. The right side of the car hit the embankment to the north of the highway and it ended up headed west. The right door of the car flew open and just before I stopped I jumped out the door to look for my wife. She had been thrown out of the car. My daughter was not thrown out of the car. I was shaken up and received a bruised forearm and knee. My daughter was not injured. My wife received four broken ribs on the left side and her left lung was punctured. She is in the hospital at this time in Stroud, Okla. She also had a bruised left arm. The truck that turned in front of me was a Ford dumptruck driven by Jim Gloves of Stratford, Okla. The truck is owned by the R. M. Webb Contractors. The truck carried a 1952 Okla. license number 344-630. I hollered for somebody to call a sheriff and an ambulance. I don't know who called them. About 10—15 minutes after the accident the ambulance arrived. They took Mrs. Keller to the Glendale Hospital in Stroud and my daughter went along with her. The highway patrolman, V. R. Anderson, Trooper 67, Box 5, Chandler, Okla. arrived about the same time as the ambulance. He investigated the accident. I don't know if any arrests were made. The driver of the truck was an elderly gray headed man and he wore glasses. After the accident my car was up against the embankment and didn't look drivable. The man from the Ford garage came out and said he thought it would be all right to drive it. I drove it in into Stroud and it was taken from there to the Buick garage in Okla. City. The accident happened at about 11:50 A. M. The driver of the truck said he didn't see me. There was another car behind the truck. This car was driven by Harvey M. Israels of 48 Beacon Pl., Pasadena, California. He volunteered to be a witness in my behalf. He overheard the truckdriver say that he hadn't seen me. Mr. Israels was raising cain with the truckdriver

and the Patrolman told him to move along. Before he left he told me to be sure to write him if he could be of any help to me. There was another truckdriver that witnessed the accident but I don't know his name. This driver and the one who was driving the truck involved came by the hospital before I got there to see how my wife was. I don't know of any other actual witnesses but there were quite a few people gathered around. My wife, Helene, will probably have to stay here at the hospital for another 10 days. I plan to remain here until such time as she is released. This below is a diagram of the scene of the accident just before the truck turned.

(Diagram.)

This is a diagram of how the accident occurred.

(Diagram.)

After I left my car at the Ford garage the patrolman brought me over to the hospital. I wasn't examined at the hospital and my daughter wasn't either. Two doctors and one intern have been taking care of my wife. There is no private nurse on duty.

I have read the above 5½ page report and it is true and correct and constitute the facts of the accident as I know them.

/s/ Gustave Keller.

I am Irene Keller, age 26, and was a passenger in the car driven by my father, Gustave Keller. I was present when this report was made and have read it and it is true and correct and constitute the facts as I know them and I have nothing further to add to it.

/s/ Irene Keller.

Exhibit "B" Attached to Complaint.

May 22, 1957

Mr. Alex Cheek—

I am being sued by Helene Keller for an amt. for in access of my liabiility coverage.

Consider this as formal demand upon you and my Ins. Co., to settle this case within my policy limit thereby protecting me from any judgment and liability in access of my coverage.

This can be done and insist that you do it if you don't I shall expect you and the Ins. Co. to pay the full amt. of any Judgment, against me.

/s/ Gustave Keller.

Exhibit "B" of Petition.

IN THE UNITED STATES DISTRICT COURT.
* * (Caption—57-C-124) * *

MOTION TO TRANSFER CAUSE.

Comes now the separate defendant, Helene E. Keller, and, under the authority of 28 U. S. C. A. 1404, moves the Court to transfer this cause for trial to the U. S. District Court for the Western District of Oklahoma. This defendant represents to the Court that such a transfer would be for the convenience of the parties and witnesses, in the interests of justice, and the Court to which transfer is requested is a Court wherein this action might have originally been brought.

Sydney Eisenberg,
1131 West State Street,
Milwaukee, Wisconsin.

James E. Driscoll,
Herrin Building,
Seminole, Oklahoma,
Attorneys for Separate Defendant, Helene Keller.

By James E. Driscoll.

I, James E. Driscoll, hereby certify that I mailed a true and correct copy of the above Motion to Transfer Cause to Suel O. Arnold and Dougherty, Arnold, Philipp & Murray, Attorneys for Plaintiff, at 1100 Empire Building, Milwaukee, Wisconsin, on this 18th day of June, 1957.

James E. Driscoll.

Exhibit "C" of Petition.

IN THE UNITED STATES DISTRICT COURT.
* * (Caption—57-C-124) * *

MOTION TO TRANSFER CAUSE.

Comes now the separate defendant, Gustave F. Keller, and, under the authority of 28 U. S. C. A. 1404, moves the Court to transfer this cause for trial to the U. S. District Court for the Western District of Oklahoma. This defendant represents to the Court that such a transfer would be for the convenience of the parties and witnesses, in the interests of justice, and the Court to which transfer is requested is a Court wherein this action might have originally been brought. An affidavit is attached hereto in support of this motion.

Joe Francis,
911 Kennedy Building,
Tulsa, Oklahoma,
Attorney for Separate Defendant, Gustave Keller.

I, Joe Francis, hereby certify that I mailed a true and correct copy of the above Motion to Transfer Cause to Suel O. Arnold and Dougherty, Arnold Philipp & Murray, Attorneys for Plaintiff, 1100 Empire Building, Milwaukee, Wisconsin, on this 17th day of June, 1957.

Joe Francis.

State of Oklahoma, }
County of Tulsa. } ss.

Joe Francis, of lawful age, being first duly sworn, deposes and says as follows:

1. I have been employed in this cause to represent Gustave F. Keller and have investigated the facts.

2. The automobile accident out of which the liabilities arise in this case occurred in the State of Oklahoma.

3. Plaintiff insurance company does business in the State of Oklahoma and this affiant verily believes that no hardship or inconvenience will be worked against plaintiff insurance company if this cause is transferred to Oklahoma.

4. All the evidence on the issue of cooperation or non-cooperation must be derived from the State of Oklahoma. The court reporter who officiated at the principal trial, wherein plaintiff now claims this defendant failed to cooperate, resides in Oklahoma. The court reporter and his court reporter notes will be necessary proof of whether or not Gustave Keller cooperated with plaintiff insurance company at said trial. The highway patrolman who investigated the accident resides in Oklahoma. His testimony on the issue of liability will be all-important if the Federal Court is to determine whether or not defendant's statement, attached to plaintiff's complaint, fairly apprised plaintiff insurance company of the liability in this case so as to constitute "cooperation" as that term is defined in the policy.

5. This affiant further states that it is important, in the interests of justice, to transfer this cause to the U. S. District Court for the Western District of Oklahoma for the reason that issues other than that of cooperation or non-cooperation must be determined in this case. The injured party offered to settle within the policy limits. Since a judgment was rendered in excess of the policy limits and

since this defendant requested that plaintiff insurance company settle this case within the policy limits, the Court which determines the declaratory judgment action should determine liability of the plaintiff insurance company beyond the policy limits on the grounds of negligence and bad faith in failing to settle the case within the policy limits. This issue of bad faith on the part of the insurance company and liability beyond the policy limits will be raised by cross complaint. The issue is germane to the issue raised by plaintiff insurance company. All the witnesses on this issue of good faith and liability beyond the policy limits are in Oklahoma with the exception of this defendant and he also will be present in Oklahoma if the case is transferred there. Witnesses in Oklahoma who will have pertinent evidence on the issue of bad faith are Mr. Joseph Sharp, attorney for one of the other defendants in the principal action; Mr. Alex Cheek, attorney for plaintiff insurance company; and Messrs. Blackstock and Jones, attorneys who appeared in the principal action and who have knowledge of the facts on the issue of bad faith and failing to settle the case. All of these attorneys will substantially testify that plaintiff insurance company could have settled this case for $6,500.00; that these attorneys are all familiar with personal injury litigation in Oklahoma and the hazards of a jury verdict in cases of this kind; that in view of the evidence in this case, with which they were familiar, in their opinion as expert witnesses, the attorneys for the insurance company were negligent in not settling this case within the policy limits, that is, $6,500.00. Mr. Cheek would testify he wasn't negligent.

Further, affiant sayeth not.

Joe Francis.

Subscribed and sworn to before me, a Notary Public in and for said County and State, this 17th day of June, 1957.

Notary Public.

My commission expires: August 10, 1960.

43 Exhibit "D" of Petition.

IN THE UNITED STATES DISTRICT COURT.
* * (Caption—57-C-124) * *

MOTION FOR A TEMPORARY INJUNCTION AND FOR AN ORDER ADVANCING THE ACTION FOR TRIAL.

Now comes the plaintiff by Snel O. Arnold and Dougherty, Arnold, Philipp & Murray, its attorneys, and upon the complaint and the affidavit of John A. Hanna, moves the court as follows:

(1) For temporary injunction pending the trial and final judgment in the above-entitled action, restraining the defendant, Helene E. Keller, from instituting any action, at law or in equity or any legal proceeding including but not limited to garnishment actions or proceedings against the plaintiff in any District Court of the United States in the State of Oklahoma, or in any other state or territory of the United States, or in any state court in the State of Oklahoma, or in any other state.

(2) For a temporary injunction pending the trial and final judgment in the above-entitled action, restraining the defendant, Gustave F. Keller, from instituting any action, at law or in equity or any legal proceeding including but not limited to garnishment actions or proceedings against the plaintiff in any District Court of the United States in the State of Oklahoma, or in any other state or ter-
44 ritory of the United States, or in any state court in the State of Oklahoma, or in any other state.

(3) For an order providing a speedy hearing in this action, and for an order advancing the action for trial on

the calendar of the court as provided by Rule 57, Federal Rules of Civil Procedure.

Dated, this 5th day of July, 1957.

Suel O. Arnold and
Dougherty, Arnold, Philipp & Murray,
By /s/ Suel O. Arnold,
Attorneys for Plaintiff,
710 North Plankinton Avenue,
Milwaukee 3, Wisconsin.

45 Exhibit "D" of Petition (Cont.)

IN THE DISTRICT COURT OF THE UNITED STATES.
(Caption—57-C-124)

AFFIDAVIT IN SUPPORT OF MOTION FOR A TEMPORARY INJUNCTION AND FOR AN ORDER ADVANCING THE ACTION FOR TRIAL.

State of Wisconsin
County of Milwaukee } ss

John A. Hanna, being first duly sworn, on oath deposes and says:

(1) He is now and has been for seven years last past the claims manager of the plaintiff. During such period, he has maintained his office in the City and County of Milwaukee, State of Wisconsin, in order to service the territory to which he has been assigned, namely, the State of Wisconsin.

(2) As such claims manager, he became acquainted with the defendants on the 16th day of November, 1949, in connection with an automobile accident in which the defendants were involved.

(3) The plaintiff, General Casualty Company of Amer-

ica, is a corporation organized under the laws of the State of Washington, and is licensed to transact the business of insurance in the State of Wisconsin.

(4) The defendant, Gustave F. Keller, is a citizen and resident of the State of Wisconsin, and resides at 5895 North Witte Lane, in the City and County of Milwaukee, State of Wisconsin.

(5) The defendant, Helene E. Keller, is a citizen and resident of the State of Wisconsin, and resides at 5895 North Witte Lane, in the City and County of Milwaukee, State of Wisconsin.

(6) The defendants are husband and wife.

(7) On the 15th day of October, 1952, there was in effect a policy of automobile liability insurance, No. CA 142068, covering a 1950 Buick automobile owned by the defendant, Gustave F. Keller. The policy was issued by the plaintiff to the defendant, Gustave F. Keller, in Wisconsin and contained the usual provisions found in an automobile liability policy issued in Wisconsin.

(8) On October 15, 1952, and while the policy of automobile liability insurance issued by the plaintiff to the defendant, Gustave F. Keller, was in effect, the defendant, Helene E. Keller, was a passenger in the 1950 Buick automobile owned by the defendant, Gustave F. Keller. At the time that the defendant, Helene E. Keller, was a passenger in her husband's automobile and while the defendant, Gustave F. Keller, was operating his automobile on U. S. Highway 66 in the State of Oklahoma, a truck crossed the path of the Buick automobile, and in attempting to avoid a collision with the truck, the defendant, Gustave F. Keller, lost control of the Buick automobile which resulted in personal injuries to the defendant, Helene E. Keller.

(9) On the 16th day of October, 1952, the defendant, Gustave F. Keller, gave a statement to the plaintiff, a copy of which, marked Exhibit "A", exclusive of the diagrams

drawn by the defendant, Gustave F. Keller, is attached to and forms a part of the complaint. Such statement indicates upon its face that the injuries sustained by Mrs. Keller did not result from any negligence of the defendant, Gustave F. Keller.

(10) In the year 1954, the defendant, Helene E. Keller, brought a suit against the defendant, Gustave F. Keller, and others in a state court in the State of Oklahoma. The suit was dismissed as against one co-defendant, but was prosecuted as against the defendant, Gustave F. Keller, and another defendant resulting in a verdict in favor of the plaintiff, Helene E. Keller, against the defendant, Gustave F. Keller, and another.

(11) The plaintiff fully performed all of the terms and conditions of the automobile liability insurance policy, including the provision of such policy requiring the plaintiff to furnish a defense to the defendant, Gustave F. Keller.

(12) Upon information and belief, the affiant states: The defendant, Gustave F. Keller, failed and refused to comply with the terms and conditions of the policy of automobile liability insurance issued by the plaintiff which imposed upon the defendant, Gustave F. Keller, the duty to cooperate with the plaintiff and to assist the plaintiff in effecting settlements and in securing and giving evidence. Such failure and refusal consisted among other things in failing to inform the plaintiff of all the facts and circumstances in connection with the avoidance of a collision between the Buick automobile and the truck as the defendant Gustave F. Keller claimed such facts to be at the time of the trial of the action in Oklahoma at which the defendant Gustave F. Keller testified as a witness in his own behalf, and in failing and refusing to assist in the settlement of the claim of his wife, Helene E. Keller, in such state court action and in demanding on May 22, 1957, on the day that the trial in the state court of Oklahoma commenced that the plaintiff settle

the claim of the defendant, Helene E. Keller, within the policy limit of Ten Thousand and no/100 ($10,000.00) Dollars as indicated by the demand in writing, a copy of which, marked Exhibit "B", is attached to and forms a part of the complaint.

(13) Such failure and refusal on the part of the defendant Gustave F. Keller to comply with the terms and conditions of such automobile liability policy constituted a breach of the contract existing between the plaintiff and the defendant Gustave F. Keller, and by reason of such breach of contract, the plaintiff is under no liability to the defendant, Gustave F. Keller, on account of the issuance of such automobile liability insurance policy to the defendant, Gustave F. Keller.

(14) Upon information and belief, the affiant states: The defendants give out and threaten that they will institute actions against the plaintiff in the state court of Oklahoma and in the Federal Court in Oklahoma; that in such actions the defendants will attempt to enforce both legal and equitable remedies and will attempt to enforce the remedy, among others, of garnishment against the plaintiff; that because of such threatened actions, the plaintiff will be irreparably damaged and that in enforcing such remedies, the defendants will commence a multiplicity of actions which will result in expense and inconvenience to the plaintiff.

(15) On information and belief, the affiant alleges that the plaintiff does not have an adequate remedy at law and that a temporary injunction during the pendency of the above-entitled action is necessary in order to prevent a multiplicity of actions and in order that the court may in one action expeditiously determine the rights and liability of the respective parties.

(16) This affidavit is made by the affiant in support of a motion for a temporary injunction to restrain the de-

fendants while this action is pending before this court from instituting any action at law or in equity or any legal proceeding, including but not limited to garnishment.

(17) The affiant states that the plaintiff will furnish a suitable bond in the event the court determines to grant a temporary injunction.

(18) This affidavit is also made in support of a motion to advance the case for trial on the calendar of the court.

/s/ John A. Hanna.

Subscribed and sworn to before me this 5th day of July, 1957.

/s/ Catherine Keegan,
Notary Public, Milwaukee Co., Wis.

My commission expires: Jan. 1, 1961.

Exhibit "E"—Opinion of Respondent ordering action entitled General Casualty Company of America *vs.* Gustave F. Keller and Helene E. Keller, pending in the U. S. District Court for the Eastern District of Wisconsin, transferred to the U. S. District Court for the Northern District of Oklahoma.

(This exhibit has already been made part of this Appendix—see pages 1-2.)

Exhibit "F"—Order of Respondent Transferring the cause entitled General Casualty Company of America *vs.* Gustave F. Keller and Helene E. Keller, pending in the District Court of the United States for the Eastern District of Wisconsin, to the District Court of the United States for the Northern District of Oklahoma.

(This exhibit has already been made part of this Appendix—see pages 3 to 8.)

IN THE UNITED STATES COURT OF APPEALS.
* * (Caption—12341) * *

BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF MANDAMUS.

Statement of Facts.

Petitioner, General Casualty Company of America, is a corporation organized under the laws of the State of Washington, and is licensed to transact the business of insurance in the State of Wisconsin. Gustave F. Keller and Helene E. Keller are husband and wife, are citizens of the State of Wisconsin, and reside at 5895 North Witte Lane, in the City and County of Milwaukee, State of Wisconsin.

On October 15, 1952, General Casualty Company of America had in effect a policy of automobile liability insurance issued to Gustave F. Keller, insuring him against loss or damage caused by the negligent operation of his 1950 Buick automobile.

On October 15, 1952, Mrs. Keller sustained personal injuries when she was a passenger in her husband's automobile as she and her husband were traveling on Highway 66 in the state of Oklahoma. In 1954, Mrs. Keller brought suit against her husband and others in a state court in Oklahoma to recover damages for her personal injuries. The trial of the action resulted in a judgment in favor of Mrs. Keller, largely in excess of the policy limits of General Casualty Company of America. The judgment was against the husband and others. There has been an appeal to the Oklahoma Supreme Court from the judgment.

After the judgment was entered in the state court of Oklahoma, General Casualty Company of America, which was not a party to the action, brought a declaratory judgment action in the District Court of the United States for

the Eastern District of Wisconsin against Gustave F. Keller and Helene E. Keller for a declaratory judgment and alleged that Gustave F. Keller failed to cooperate in the defense of the Oklahoma state court action, and that such failure constituted a violation of the terms and conditions of the insurance policy issued by General Casualty Company of America to Gustave F. Keller.

Counsel for Gustave F. Keller and for Helene E. Keller have moved for transfer of the action instituted by General Casualty Company of America to the District Court of the United States for the Western District of Oklahoma. The trial court permitted counsel to amend their petition so as to request a transfer of the action to the District Court of the United States for the Northern District of Oklahoma. The motions to transfer were made under the provisions of Section 1404(a) of Title 28, U. S. Code. The motions recited that the declaratory judgment action could have been brought in the District Court of the United States for the Northern District of Oklahoma.

The trial court in a memorandum decision held that the action could have been brought in Oklahoma and granted the motion to transfer. Because the Circuit Court of Appeals for the Seventh Circuit has never passed upon the question and because the Order entered by the trial court is not an appealable order, General Casualty Company of America has filed its petition for a writ of mandamus to have this court pass upon the propriety of the order of transfer.

I. **The Circuit Court of Appeals of the Seventh Circuit Has Jurisdiction to Grant the Petition for a Writ of Mandamus.**

This court has had occasion in the past two years to determine the propriety of the granting of a writ of mandamus to a District Court under the provisions of the All Writs Act, 28 U. S. C., Sec. 1651(a). The first recent leading case is *Chicago R. I. & P. R. Co.* v. *Igoe*, 220 F. (2d) 299 (CCA 7, 1955). In that case, Judge Igoe refused to transfer a case from Illinois to Iowa under the provisions of 28 U. S. C. A., Sec. 1404(a). The court, in an opinion written by Chief Judge Duffy, held, Judge Finnegan dissenting, that the court had power to require the trial court to enter an order for transfer. In the recent case of *LaBuy* v. *Howes Leather Co.*, 352 U. S. ____, 1 L. Ed. (2d) 290, the United States Supreme Court interpreted the All Writs Act, 28 U. S. C., Section 1651(a). The majority of the court held that a Circuit Court of Appeals had the power to issue a writ of mandamus directed to a District Court. In the dissenting opinion of Mr. Justice Brennan, with whom Mr. Justice Frankfurter, Mr. Justice Burton, and Mr. Justice Harlan joined, Mr. Justice Brennan stated that there was a distinction between a case where the action of the trial judge in granting an order could be reviewed by a Circuit Court of Appeals and in a case where it would be impossible to secure such a review. At page 302 of 1 L. Ed. (2d), Justice Brennan stated that the focal question posed for a Court of Appeals by a petition issued for a writ of mandamus was whether the action of a District Court tended to frustrate or impede the ultimate exercise by the Court of Appeals of its appellate jurisdiction granted in some other pro-

vision of the law. On this point, the Justice Brennan said, page 302 of 1 L. Ed. (2d):

> "The answer is clearly in the affirmative where, for example, the order of the District Court transfers a cause to a District Court of another circuit for decision. That was *Josephson*, where the Court of Appeals for the First Circuit held that an order of a District Court in the circuit transferring a case to the District Court of another circuit was within the reach of the Court of Appeals' power under the All Writs Act because 'the effect of the order is that the district judge has declined to proceed with the determination of a case which could eventually come to this court by appeal from a "final decision".' 218 F. 2d at 181. In contrast, a District Court order denying a transfer would not come under the umbrella of power under the All Writs Act, since retention of the cause by the District Court can hardly thwart or tend to defeat the power of the Court of Appeals to review that order after final decision of the case."

In this case, the Order of Judge Grubb transfers the case to the District Court of the United States for the Northern District of Oklahoma which is outside the Seventh Circuit. The General Casualty Company of America therefore will be precluded from a review of the propriety of the Order of transfer unless this court grants an alternative writ of mandamus to determine the propriety of the Order.

Therefore, we respectfully submit that the court grant a writ of mandamus in this case in order that litigants and counsel in the Seventh Circuit may determine the propriety of an order of transfer.

The trial court relied upon the decisions in three Circuit Courts of Appeals cases: *Paramount Pictures, Inc. v. Rodney*, 186 F. (2d) 111 (CCA 3); *Anthony v. Kautman*, 193 F. (2d) 85 (CCA 2), and *In Re Josephson*, 218 F. (2d) 174 (CCA 1).

The dissenting opinion of Mr. Justice Brennan, page 301 of 1 L. Ed. (2d), cites *In Re Josephson*, 218 F. (2d) 174 (CCA 1).

II. The Trial Court Did Not Have Jurisdiction to Transfer the Action to the District Court of the United States for the Northern District of Oklahoma Because the Declaratory Judgment Action Instituted by the General Casualty Company of America Could Not Have Been Brought in the District Court of the United States for the Northern District of Oklahoma.

Section 1404(a) of Title 28, U. S. Code, provides:

> "For the convenience of parties and witnesses, in the interest of justice a district court may transfer any civil action to any other district or division where it might have been brought."

The question involved in every motion made for a transfer is whether the action might have been brought in the District Court to which the moving party seeks a transfer.

The question with respect to a motion made by a plaintiff to transfer the action to another district appears to be quite well settled, although there are some decisions contrary to the weight of authority. The weight of authority is to the effect that there can be no such transfer. Judge Tehan so held in *Rogers* v. *Halford*, 107 F. Supp. 295 (D. C. E. D. Wis.), and Judge Chesnut, in an exhaustive opinion in *Mitchell* v. *Gaulock*, 136 F. Supp. 169 (D. C. Md. 1955), also held that there could be no such transfer.

Judge Grubb held on the motion to transfer that where a defendant in the case sought to be transferred agreed to submit to jurisdiction of the court in another district, the action "might have been brought" in such district. The court cited and relied upon three cases: *Paramount Pictures*,

Inc. v. *Rodney*, 186 F. (2d) 111 (CCA 3); *Anthony* v. *Kaufman*, 193 F. (2d) 85 (CCA 2), and *In Re Josephson*, 218 F. (2d) 174 (CCA 1).

District Judge Whittaker, now Justice Whittaker of the United States Supreme Court, in an exhaustive decision in *General Electric Co.* v. *Central Transit Warehouse Co.*, 127 F. Supp. 817 (D. C. Mo., 1955), held that an action could not have been brought within the meaning of the statute where the defendants in the action did not reside in the district to which the transfer was sought for the reason, among others, that under Section 1391 of the U. S. Code, Title 28, service could not be had on the defendants because of lack of residence requirements. On this point, Justice Whittaker said, page 824:

> "It follows that the first question—and, I think, the determinative question—here, is whether this action 'might have been brought' in the District Court of the United States for the Northern District of Iowa. The word 'brought', as used in the statute, is not synonymous with the word 'commenced' in the sense used in Rule 3 of Federal Rules of Civil Procedure, as the phrase 'where it might have been brought', as used in the statute, contemplates a forum having venue and in which jurisdiction of the parties could be acquired if the action were originally brought there. In *Greve* v. *Gibraltar Enterprises*, D. C. N. M. 85 F. Supp. 410, 412, the court answered the point in this way. 'First, the Court believes the language of the statute, "where it might have been brought", relates primarily to venue and in a proper case would include jurisdiction. It concerns plantiff's right to institute the suit originally.' Judge Learned Hand, in *Foster-Milburn Co.* v. *Knight*, 2 Cir., 181 F. 2d 949, decided the point in the same way. He said, at page 951: 'We do not forget that an action "is commenced" when the complaint is filed; and it would follow, if it is "brought" whenever it is "commenced", that the plaintiff is right. The inference is, however, unwarranted that Rule 3 meant to assimilate the filing of a complaint to the service of a summons.'

He concluded that the right to transfer an action " "presupposes at least two forums in which the defendant is amenable to process." " Judge Fee, is *United States* v. *11 Cases, etc., supra* (94 F. Supp. 927) decided the question in the same way, saying, in an action which could not have been originally brought in the district to which he was asked to transfer it, for want of venue and jurisdiction, the following: 'Since no statutory provision exists, this Court is without power to initiate the transfer.' To the same effect is *Burns* v. *Chubb*, D. C. E. D. Pa., 99 F. Supp. 581."

There are a number of cases which follow the decision of Justice Whittaker, among them being *Foster-Milburn Co.* v. *Knight*, 181 F. (2d) 949, 951 (CCA 2), and *Shapiro* v. *Bonanza Oil Co.*, 185 F. (2d) 777 (CCA 9).

We appreciate that, consistent with the spirit of the rules of this Court, a brief accompanying a petition for a writ of mandamus should be confined to an outline of the questions of law put in issue by the petition. We have therefore merely invited the Court's attention to two lines of authority as indicating the nature of the questions presented. A construction of Section 1404(a) of Title 28, U. S. Code which permits a defendant to select a forum simply on the basis of an agreement to submit to jurisdiction, is an emasculation of the statute as Mr. Justice Whittaker pointed out when he was District Judge in *General Electric Co.* v. *Central Transit Warehouse Co.*, 127 F. Supp. 817 (D. C. Mo. 1955).

We therefore respectfully submit that the Court should grant an alternative writ of mandamus to review the order of transfer entered by the trial court.

Respectfully submitted,

Suel O. Arnold and

Dougherty, Arnold, Philipp & Murray,

of Counsel.

By /s/ Suel O. Arnold,

Attorneys for Petitioner.

9/27/57—Entered Rule to Show Cause on Respondent Why Writ of Mandamus Should Not Issue as Prayed—Issued Certified Copies of Rule to Show Cause to Counsel for Petitioner and to Respondent.

(Formal Parts Omitted)

IN THE UNITED STATES COURT OF APPEALS.

For the Seventh Circuit,

Chicago 10, Illinois.

Friday, September 27, 1957

Before Hon. Walter C. Lindley, Circuit Judge.

General Casualty Company of America, *Petitioner,* 12141 *vs.* Hon. Kenneth P. Grubb, Judge of the United States District Court for the Eastern District of Wisconsin, *Respondent.*	Original Petition for Writ of Mandamus.

RULE TO SHOW CAUSE.

This matter comes before the Court on the petition of counsel for General Casualty Company of America for a writ of mandamus, filed herein on September 24, 1957.

On consideration whereof, it is ordered that respondent show cause, if any there be, why a writ of mandamus should not issue as prayed by filing in the Office of the Clerk of this Court an original and four (4) copies of his response to this Rule within thirty (30) days from this date.

A True Copy:

Teste:

Kenneth J. Carrick,
Clerk of the United States Court of Appeals for the Seventh Circuit.
By R. Hays Blanchard,
Chief Deputy Clerk.

10/4/57—Filed original and four copies of Response of Respondent to Rule to Show Cause and Service.

(Formal Parts Omitted)

IN THE UNITED STATES COURT OF APPEALS.

* * (Caption—12141) * *

RESPONSE OF RESPONDENT TO RULE TO SHOW CAUSE WHY A WRIT OF MANDAMUS SHOULD NOT BE ISSUED AS PRAYED.

The reasons for the actions of respondent complained of in the Petition for a Writ of Mandamus and his answer to that Rule to Show Cause are as follows:

There were numerous District Court decisions on the legal problem presented which were submitted to and considered by the courts. They were in sharp conflict. The Court was aware that Mr. Justice Whittaker, when a District Judge, ruled contrary to the holding of respondent in this case. *General Electric Co.* v. *Central Transit Warehouse Co.*, 127 F. Supp. 817. As opposed to this ruling of Mr. Justice Whittaker (then District Judge) there were three cases cited by Courts of Appeals, all holding as this court held. No other decisions of any Court of Appeals were cited to this court by counsel and none was found by this court.

After the decision was handed down, the decision of the Court of Appeals for the Fifth Circuit in *Ex Parte Blaski*, 245 F. 2d 737 was printed, in which it agreed with the Courts of Appeals for the First, Second and Third Circuits cited in the opinion of this court. No doubt the Court of Appeals for the Fifth Circuit also had Judge Whittaker's decision in the General Electric case cited to it when it handed down the decision in *Ex Parte Blaski*.

It was and is the belief of this court that the opinions of the Courts of Appeals relied upon, and of the District Courts holding that way, are not only more authoritative, but also more logical than the decisions of the District Courts holding otherwise.

Dated, Milwaukee, Wisconsin, this 3rd day of October, 1957.

Respectfully submitted,

Kenneth Grubb,
U. S. District Judge.

10/16/57—Filed original and four copies of Motion and Affidavit to Extend Time to File Petitioner's Brief and Appendix to November 11, 1957.

(Formal Parts Omitted)

IN THE UNITED STATES COURT OF APPEALS.
* * (Caption—12141) * *

MOTION TO EXTEND TIME FOR FILING OF BRIEF BY PETITIONER.

Now comes the petitioner by Suel O. Arnold and Dougherty, Arnold, Philipp & Murray its attorneys, and moves the court upon the affidavit of Suel O. Arnold to extend the time for filing a brief and appendix by the petitioner to November 11, 1957.

Dated this 15th day of October, 1957.

Suel O. Arnold and
Dougherty, Arnold, Philipp & Murray,
By /s/ Suel O. Arnold,
Attorneys for Petitioner,
710 N. Plankinton Avenue,
Milwaukee 3, Wisconsin.

IN THE UNITED STATES COURT OF APPEALS.
* * (Caption—12141) * *

AFFIDAVIT IN SUPPORT OF MOTION TO EXTEND TIME FOR FILING OF BRIEF BY PETITIONER.

State of Wisconsin, } ss.
County of Milwaukee. }

Suel O. Arnold, being first duly sworn on oath, deposes and says:

(1) He is one of the attorneys representing the plaintiff-petitioner in the above-entitled action.

(2) On the 27th day of September, 1957, the court ordered that a Rule to Show Cause issue to the respondent to show cause why a Writ of Mandamus should not issue as prayed for in the petitioner's petition.

(3) On the 3rd day of October, 1957, the respondent served a Response of Respondent to the Rule to Show Cause why a Writ of Mandamus should not be issued as prayed.

(4) Rule 19 of the Rules of the Court of Appeals of the Seventh Circuit provides that if a Rule to Show Cause is entered, the Clerk shall deliver one certified copy to the petitioner and one to the respondent. The respondent is then required to file an answer to the petition on or before the return day specified in the Rule. The Petition and Answer shall be given preference over other civil cases and shall be brought on for hearing at the earliest convenient session of the court after the expiration of the time fixed for filing briefs.

(5) Rule 16 of the Rules of the Court of Appeals for the Seventh Circuit provides that on all appeals or petitions for review, the appellant or petitioner shall file his printed brief and printed appendix within thirty days

"after the record is filed." The affiant assumed that the court would indicate whether it would determine the issues framed by the petition and the answer, or whether a record should be sent up from the District Court of the United States for the Eastern District of Wisconsin.

(6) In the opinion of the affiant, there is no necessity for any further record to be filed with the court and that the court may pass upon all of the questions presented upon the basis of the Petition and the Answer. Because of assumption of affiant with respect to the entry of an order relating to the record, the affiant has not prepared and served a brief and appendix.

(7) This affidavit is made in support of a motion to extend the time for the filing of a brief by the petitioner until November 11, 1957. The affiant makes the application for the reason that he alone is familiar with the issues and will personally prepare the brief.

(8) In the event the court does not see fit to grant the motion, affiant will nevertheless prepare and file a brief with the assistance of other members of the firm.

/s/ Suel O. Arnold

Subscribed and sworn to before me this 15th day of October, 1957.

/s/ Helen M. Taberman,
Notary Public, Milwaukee Co., Wis.

My commission expires: 9/24/61.

10/16/57—Entered Order Extending Time for Filing Petitioner's Brief and Appendix to November 11, 1957.

IN THE UNITED STATES COURT OF APPEALS.
* * (Caption—12141) * *

(Formal Parts Omitted)

On consideration of the motion and affidavit of counsel for petitioner,

It Is Ordered that the time for filing petitioner's brief and appendix be extended to November 11, 1957.

10/23/57—Filed original and four copies of Application of Kellers for Leave to File Brief as Amicus Curiae and Service.

IN THE UNITED STATES COURT OF APPEALS.
* * (Caption—12141) * *

(Formal Parts Omitted)

APPLICATION OF GUSTAVE F. KELLER AND HELENE E. KELLER FOR LEAVE TO FILE BRIEF AMICUS CURIAE.

Come now Gustave F. Keller and Helene E. Keller and make application to this court for leave to file brief amicus curiae in this cause. Applicants represent to the court that they are defendants in civil action #57-C-124 in the United States District Court for the Eastern District of Wisconsin, which is the cause out of which the present controversy arises. These applicants state that their substantive rights will be affected by this court's decision in connection with granting or denying the writ. These applicants were sued by General Casualty Company of America in the United

States District Court for the Eastern District of Wisconsin, to determine liability, if any, of that insurance company to these defendants. The insurance company asked for relief under the Declaratory Judgment Act. These applicants filed their motion to transfer the cause to the United States District Court for the Northern District of Oklahoma, pursuant to the provisions of 28 USCA 1404. After argument and briefs the trial judge sustained the motion and ordered the cause transferred. The present petition for a writ of mandamus in this court was filed by the insurance company against the trial judge in an effort to prevent the transfer of this cause to the United States District Court for the Northern District of Oklahoma. The substantive rights of applicants will be affected by the court's decision in this cause. Your applicants would further show to the court that they have briefed the legal questions involved for the court below and believe that these authorities will be of assistance to this court. Applicants attach to this application a short brief.

Wherefore, applicants pray that the court enter its order allowing them to file attached brief amicus curiae.

Joe Francis,
911 Kennedy Building,
Tulsa, Oklahoma,
Attorney for Gustave F. Keller.

/s/ Sydney M. Eisenberg,
1131 West State Street,
Milwaukee, Wisconsin,
Attorney for Helene E. Keller.

State of Oklahoma, }
County of Tulsa, } ss.

Joe Francis, being first duly sworn upon oath, deposes and says that he is the attorney for Gustave F. Keller; that he has read and prepared the above and foregoing application and that the facts therein contained are true and correct as he verily believes.

Joe Francis.

Subscribed and sworn to before me, this 17th day of October, 1957.

Miriam Rochels,
Notary Public.

My commission expires: August 10, 1960.

IN THE UNITED STATES COURT OF APPEALS.

* * (Caption—12141) * *

BRIEF AMICUS CURIAE OF GUSTAVE F. KELLER AND HELENE E. KELLER.

Point One: Where Plaintiff Brings An Action In a Federal District Court And All Defendants Join In a Motion To Transfer The Cause To Another District Court Under The Provisions Of 28 USCA 1404, The Plaintiff Cannot Complain That The Action Could Not Have Been Brought Originally In The Latter Court, For The Reason That Defendants Entered Their Appearance In The Latter Court By Filing The Motion.

Petitioner has cited many cases wherein plaintiff files an action in a federal district court, obtains service on the defendants, and thereafter *plaintiff* files a motion to transfer the cause to a federal district court where the defendants are not amenable to process. These cases uniformly hold that the cause cannot be transferred on motion of *plaintiff* under 28 USCA 1404. However, the rule is otherwise when plaintiff files the action and *defendants* file the motion to transfer. In the latter case defendants, by filing their motion, waive any lack of venue and enter their appearance.

Petitioner's Cases Distinguished.

In *Rogers* v. *Halford*, 107 F. Supp. 295 (D. C. E. D. Wis.), plaintiff filed the suit in Wisconsin and *plaintiff* moved to transfer the case to California. At page 295 the court said:

> Plaintiffs have moved the court for an order transferring the place of trial in this case to the United States District Court for the Northern Division of the Northern District of California, pursuant to Title 28 USCA 1404(a) * * * At the time of the accident all of

> the parties were residents of California. About three months later, however, the defendant moved to Wisconsin where she has since resided.

The case is not in point. In the case at bar, defendants filed the motion to transfer and have thereby entered their appearance in the court to which transfer was ordered.

In *Mitchel v. Gunloch*, 136 F. Supp. 169 (D. C. Md. 1955), cited by petitioner, plaintiff filed the suit in the trial court and the *plaintiff* filed the motion to transfer, therefore, the case is not in point. It is significant that the court recognized the distinction we here make. At page 171 the court underlined the word plaintiff. The opinion reads (page 171):

> On November 1, 1955, plaintiff filed a motion to transfer this case * * *

At page 175 the opinion continued:

> We are not dealing with the more complicated situation which may arise when there are numerous defendants, some of whom could be effectively sued in another district, and where some who could not be so sued expressed their willingness to waive their personal immunity from suit in the other district.

In *Foster-Milburn Co. v. Knight*, 181 F. 2d 949, and *Shapiro v. Bonanza Oil Co.*, 185 F. 2d 777, cited by petitioners, plaintiffs also filed a motion to transfer; therefore these cases are not in point. We quote from page 778 of the opinion in the *Shapiro* case, *supra*:

> Sam Shapiro, appellant and plaintiff below, has appealed from an order denying this motion for a change of venue from the district court for the district of Nevada to the district court for the Southern district of California. (underlining ours.)

To repeat, all of the cases referred to above, which have been cited by petitioner, involve a factual situation where plaintiff in the court below filed the motion to transfer to

a district where defendants were not amenable to process. Under such a factual situation there would be no waiver of summons and lack of venue.

This leaves only one case cited by petitioner which we consider in point. This is the district court case of *General Electric Co.* v. *Central Transit Warehouse Co.*, 127 F. Supp. 817 (D. C. Mo. 1955). This case is in direct conflict with cases from various circuit courts. We do not believe that a district court decision will overrule repeated decisions of the circuit courts of appeals of various circuits. Apparently, this is the only decision contrary to the decision of the circuit courts of appeals which we will hereinafter cite. We call the court's attention to the fact that it was only on petition for rehearing that the district court discussed the question of venue and waiver of summons. Apparently, the attorneys did not raise this point, the point herein involved, until after the original opinion had been written. In other words, the district judge had written his opinion before he was called upon to consider the question now before the court. The opinion written in connection with the petition for rehearing was written in justification of a ruling which did not consider the waiver of summons and venue question.

Controlling Decisions.

It is submitted that this circuit should follow the decisions of all the other circuit courts of appeals which have had occasion to pass on this question.

In *Paramount Pictures* v. *Rodney*, 186 F. 2d 111, CCA 3d, 1951, plaintiff filed suit in the federal district court in California against various defendants who could be served in California only. These defendants were not amenable to process in Texas. The defendants all joined in a motion to transfer the cause to a federal district court in Texas. The court said, at page 115:

"The defendants' consent is sufficient to support the

> transfer here. Accordingly, the extent of the power of a district court to transfer a case under Section 1404(a) to a district to which the defendant does not consent we leave for later determination in cases which squarely present the issue."

citing *Foster-Milburn Co.* v. *Knight*, 181 F. 2d 949 (which is one of the cases relied upon by petitioner. The opinion of the *Paramount* case, *supra*, continued at page 113:

> * * * The actions could not consequently have been brought against all the defendants in any district court in Texas * * * By joining in the motion to transfer, the defendants have waived any objection to Texas venue and have agreed to submit themselves to a Texas court. Therefore, suits embracing the same parties and the same subject matter could now be brought and maintained in Texas.

Also, in *Theater Enterprises* v. *Paramount Film Distributing Corp.*, 201 F. 2d 306, CCA 4th, 1953, the court cited with approval the case of *Paramount Pictures* v. *Rodney*, *supra*. In the *Theater Enterprises* case, the case was transferred from Philadelphia to Baltimore on defendant's motion to transfer. The court instructed the jury that the case could have originally been brought in Baltimore (for the reason that defendant entered an appearance by making the motion to transfer). The court said at page 313:

> "There is nothing in the case, however, to indicate that the charge as given was incorrect in this particular, in fact or in law."

In *ex parte Blaski*, 245 F. 2d 737 CCA 5th, 1957, the trial court transferred a case under the provisions of 28 USCA 1404(a) on the motion of defendant. Plaintiff petitioned for a writ of prohibition as in the case at bar. Syllabus One of that opinion, decided only last month, reads:

> "Under statute authorizing federal district court to transfer any civil action to any other district or division where it might have been brought, Federal District Court for Northern District of Texas did not abuse its

discretion in granting motion of defendants who were residents of such district, to transfer patent infringement case to Northern District of Illinois in which plaintiff resided even though action could not have been brought in that district in the first instance."

We quote from the court's opinion:

"It has been held in this circuit that unless the district court has failed correctly to construe and apply the statute, consider the relevant factors incident to a motion to transfer, or has clearly abused its discretion the court of appeals should not entertain applications for mandamus to enter or vacate orders of transfer under Section 1404(a)."

The *Blaski* opinion, *supra*, cited many cases to support its opinion, including *in re Josephson*, CCA 1st, 1954, 218 F. 2d 174, and *Tones* v. *Walsh*, CCA 2d 1955, 221 F. 2d 319. As far as we know, no circuit court of appeals has held to the contrary. We believe the correct interpretation of 28 USCA 1404 to be that where all defendants join in filing a motion to transfer, the plaintiff cannot complain that the action could not have been brought there originally. The action of the defendants in submitting themselves to the jurisdiction of the court to which request for transfer is made satisfies the statutory requirement that these defendants so submitting themselves to the jurisdiction of the court be amenable to process in that court.

It is respectfully submitted that the petition for a writ should be denied.

/s/ Sydney Eisenberg,
1131 West State Street,
Milwaukee, Wisconsin,
Attorney for Helene E. Keller.

Joe Francis,
911 Kennedy Building,
Tulsa, Oklahoma,
Attorney for Gustave F. Keller.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

Chicago 10, Illinois.

Chicago, October 23, 1957

Gentlemen:

Cause No. 12141.

General Casualty Co. of America,

vs.

The Hon. Kenneth P. Grubb, Judge, Etc.

A motion or petition for leave to file brief as amicus curiae has been filed in this Court today in the above entitled cause. You are hereby notified, pursuant to Rule 72 of the Rules of this Court, that you may, if you wish, file an original and four copies of your answer to said motion or petition, together with notice and proof of service upon opposing counsel, on or before Wednesday, October 30, 1957, at the expiration of which time the Clerk will submit this matter to the Court.

Respectfully,

Kenneth J. Carrick,

Clerk

Hon. Kenneth P. Grubb,
U. S. District Judge,
Federal Pldg.,
Milwaukee, Wis.

Suel O. Arnold,
710 N. Plankinton,
Milwaukee 3, Wis.

11/1/57—Entered Order Granting Leave to Gustave F. Keller and Helene E. Keller to File a Brief as Amicus Curiae in this cause Instanter; but said Amicus Curiae shall not be entitled to participate in oral argument.

(Formal Parts Omitted.)

UNITED STATES COURT OF APPEALS.

* * (Caption—12141) * *

On consideration of the application of Gustave F. Keller and Helene E. Keller for leave to file a brief as amicus curiae in this cause.

It is ordered that Gustave F. Keller and Helene E. Keller be granted leave to file a brief as amicus curiae in this cause instanter; but amicus curiae shall not be entitled to present oral argument.

11/1/57—Filed five typed Briefs of Gustave F. Keller and Helene E. Keller as Amicus Curiae.